No. 73155-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE YATES, JR.,

Appellant.



---

ON DIRECT APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John A. McCarthy

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# BRIEF OF APPELLANT

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Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 Criminology 711-33 (1998) ..... 214

Harries and Cheatwood, *The Geography of Execution: The Capital Punishment Quagmire in America* (1997) ..... 214

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Liebman, "*A Broken System, Error Rates in Capital Cases*, 1973-75 .... 211

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Sorenson, et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime and Delinquency* 481-93 (1999) ..... 214

Thompson, *Effects of an Execution on Homicides in California*, 3 Homicide Studies 129-50 (1999) ..... 214

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*Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 Wash.L.Rev. 111 (1989).....228

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Article 6(1), and Article 7 of ICCPR, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, art. 6 (entered into force March 23, 1976.).....215

Report of the Governor's Commission on Capital Punishment (April 2002).....212

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## A. SUMMARY OF ARGUMENT

Robert Yates pleaded guilty in Spokane County Superior Court to 13 counts of first degree murder and one count of attempted first degree murder resulting in a total sentence of 408 years. Two murders in Pierce County were to be included in the plea agreement, but at the eleventh hour, the Pierce County Prosecutor's Office withdrew from the plea agreement in order to pursue the death penalty. At trial in Pierce County, the court utilized an incorrect standard, allowing the State to admit evidence of the cases from Spokane County to prove the aggravating element of common scheme or plan. Based in part on this incorrect standard of proof, Mr. Yates was convicted of two counts of aggravated murder and sentenced to death.

On appeal, Mr. Yates contends the State was estopped from proceeding on these two counts based upon the State's conduct during the plea negotiations. Specifically, enticing Mr. Yates to plead guilty, then utilizing the information he provided in reliance on the plea negotiations to convict and sentence him to death. Further, Mr. Yates contends the trial court's ruling regarding the State's burden of proof for the aggravating element of common scheme or plan lessened the burden of proof below that required by the United States and Washington Constitutions. Finally, Mr. Yates contends an array of prosecutorial misconduct and a variety of

erroneous evidentiary rulings violated both the rules of evidence as well as his right to a fair trial

Regarding his sentence of death, Mr. Yates contends the trial court erred in not finding the Spokane County and Pierce County sentences to be consecutive sentences, the death sentence was the product of passion and prejudice due to prosecutorial misconduct at the closing argument of the penalty phase, and his sentence of death is disproportionate to his sentence in Spokane County for the same conduct, and disproportionate to the sentence of serial killer Gary Ridgeway, who admitted killing more than 50 women.

B. ASSIGNMENTS OF ERROR

1. The trial court erred and deprived Mr. Yates of his Fourteenth Amendment right to due process by allowing the State to seek the death penalty.

2. The court erred in failing to equitably estop the State from seeking the death penalty.

3. The court erred in ruling that absent a challenge to his plea agreement entered in Spokane County, Mr. Yates could not seek to prevent the State from pursuing the death penalty in this case.

4. The court erred in entering Finding of Fact Regarding Equitable Estoppel 4.

5. The court erred in entering Finding of Fact Regarding Equitable Estoppel 5 (a) and (b).

6. The court erred in entering Finding of Fact Regarding Equitable Estoppel 11.

7. The court erred in entering Finding of Fact Regarding Equitable Estoppel 12.

8. Chapter 10.95 RCW violates equal protection under the Fourteenth Amendment of the United States Constitution.

9. Chapter 10.95 RCW violates equal protection under art. I, § 12 of the Washington Constitution.

10. The trial court's granting the State's challenges for cause of jurors 39, 52, and 74 violated Mr. Yates's Sixth and Fourteenth Amendment rights to a fair and impartial jury.

11. The trial court's denial of defense causes for challenge 9, 29, 100, and 120 violated Mr. Yates's Sixth and Fourteenth Amendment rights to a fair and impartial jury.

12. The trial court's refusal to allow the defense to ask jurors their religious affiliation, if any, as it impacted the jurors' definition of mercy violated Mr. Yates's Sixth and Fourteenth Amendment rights to a fair and impartial jury.

13. Instruction 20 relieved the State of its burden proving beyond a reasonable doubt the element that the murders were committed as part of a common scheme or plan.

14. The court violated Mr. Yates's right to due process when it refused to instruct the jury regarding the common scheme or plan element as set forth in Defense Proposed Instruction 7.

15. The court violated Mr. Yates's right to due process when it refused to instruct the jury on common scheme or plan as specified in Defendant's Proposed Instruction 6.

16. The court erred in entering Finding of Fact on Evidence of Common Scheme or Plan No. V to the extent it finds exclusion of evidence of the Spokane County murders would hinder the State's ability to prove the aggravating element of common scheme or plan.

17. The court erred in entering Finding of Fact on Evidence of Common Scheme or Plan No. VII to the extent it finds the only unfair prejudicial effect to Mr. Yates of admission of the Spokane County murders would be the that it might be considered by the jury as propensity evidence to find him guilty of the Pierce County murders.

18. In the absence of sufficient evidence from which the jury could conclude the State proved beyond a reasonable doubt Mr. Yates committed the murders of Ms. Mercer and Ms. Ellis as part of a common

scheme or plan, the court deprived Mr. Yates of due process by entering a conviction and death sentence.

19. The court violated Mr. Yates's right to due process when it refused to instruct the jury that "[t]he existence of a fact cannot rest in guess, speculation, or conjecture" as specified in Defense Proposed Instruction 3.

20. In the absence of sufficient evidence from which the jury could conclude the State proved beyond a reasonable doubt Mr. Yates committed the murders during the course of, in furtherance of, or in flight from robbery in the first or second degree, the court deprived Mr. Yates of due process by entering a conviction and death sentence.

21. In the absence of sufficient evidence from which the jury could conclude the State proved beyond a reasonable doubt Mr. Yates committed the murders to conceal the commission of the misdemeanor offense of patronizing a prostitute the court deprived Mr. Yates of due process by entering a conviction and death sentence.

22. The second amended information failed to provide Mr. Yates with the notice required by the Fourteenth Amendment and Article I, § 22 as it failed to include all of the elements of the offense of first degree murder with aggravating elements.

23. The trial court erred and violated the Eighth and Fourteenth Amendments in refusing to instruct the jury on the offense of first degree murder as a lesser included offense of aggravated first degree murder as set forth in Defense Proposed Instruction 2.

24. The court violated Mr. Yates's Fourteenth Amendment right to due process and ER 402, ER 403, ER 404 and ER 702 when it allowed Mark Safarik to render an expert opinion.

25. The court violated Mr. Yates's Fourteenth Amendment right to due process and ER 402, ER 403, ER 404 and ER 702 when it admitted linkage assessment evidence to prove the aggravating element of common scheme or plan.

26. The court violated Mr. Yates's right to Fourteenth Amendment due process and ER 406 and ER 702 when it allowed Lynn Everson to render an expert opinion.

27. The court violated Mr. Yates's Sixth and Fourteenth Amendment rights to present a defense and rights to equal protection and due process when it denied his motion for funds to pay for an expert on prostitution.

28. The court violated Mr. Yates's Fourteenth Amendment right to due process when it admitted irrelevant and prejudicially gruesome photographs.

29. The court violated Mr. Yates's Fourteenth Amendment right to due process when it admitted for illustrative purposes an extremely large, inaccurate, and misleading chart.

30. The prosecutor violated Mr. Yates's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process by committing misconduct during closing argument in the guilt phase of the trial.

31. The court violated Mr. Yates's Fourteenth Amendment due process right to a fair trial when it denied his motion for a mistrial due to prosecutorial misconduct.

32. The prosecutor committed misconduct when he violated the court's discovery order in questioning a witness.

33. The prosecutor's questioning of a witness impermissibly commented on Mr. Yates's exercise of a constitutional right.

34. The prosecutor committed misconduct in misstating the law during closing argument of the guilt phase of the trial.

35. Mr. Yates's Fourteenth Amendment right to due process was infringed when the prosecutor committed reversible misconduct during closing argument in the penalty phase of the trial.

36. The prosecutor improperly relied on factors other than the circumstances of the crime during the penalty phase closing argument.

37. The court violated Mr. Yates's Fourteenth Amendment right to due process and violated RCW 9.94A.589 when it refused to run the Pierce County death sentence consecutive to the Spokane County sentence.

38. Chapter 10.95 RCW violates Article I, §§ 3 and 4 of the Washington Constitution as it has led to the arbitrary and discriminatory imposition of death sentences.

39. The death verdict was based upon passion and prejudice.

40. This Court cannot answer the question posed by RCW 10.95.140(2)(b) in light of the incomplete and inaccurate trial reports that this Court has compiled for its proportionality review as required by RCW 10.95.130(2)(b).

41. Robert Yates's death sentence is disproportionate to the sentence imposed in the Spokane County case.

42. Robert Yates's death sentence is disproportionate to the sentences imposed in similar cases considering both the crime and the defendant.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the plea bargaining process comport with principles of fairness and due process. Because of the important

constitutional rights which are to be bargained away, the plea bargaining process presupposes fairness in securing agreement between the accused and the prosecutor. In the course of plea negotiations in Spokane County, the State assured Robert Yates the Spokane plea negotiations would resolve all pending matters in Spokane, Pierce, Skagit, and Walla Walla Counties. Relying on this assurance, Mr. Yates provided information regarding several murders in each of the four counties, including the two Pierce County murders for which he was convicted, the Spokane murders which the State relied upon to prove the aggravating factor of common scheme, and the Walla Walla and Skagit cases which were introduced in the penalty phase of the trial. After Mr. Yates's disclosures, the State filed the present two charges in Pierce County and filed notice of its intent to pursue the death penalty. Did the State's actions deprive Mr. Yates of Due Process?

2. Because the State failed to honor its due process obligation in plea negotiations, is there any effective remedy other than reversal of the death sentences obtained in part by the State's actions?

3. The doctrine of equitable estoppel prevents a party from altering its position where doing so would injure another party who had justifiably relied upon the first party's position. Based on the State's

change of position after Mr. Yates disclosed detrimental information, should the doctrine of equitable estoppel bar the death penalty in this case?

4. The equal protection guarantees of the Fourteenth Amendment and Article I, § 12 of the Washington Constitution require similarly situated people to receive similar treatment, and that disparate treatment of criminal defendants be justified by a rational basis. Mr. Yates was convicted of 13 counts of first degree murder for crimes committed in Spokane, Skagit and Walla Walla counties. Yet Mr. Yates was charged and convicted of two counts of aggravated first degree murder and received the death penalty in Pierce County for two murders which the jury found to be part of a common scheme or plan with ten of the Spokane murders. Where the 12 murders are factually similar is there a rational basis to justify disparate application of RCW 10.95 *et seq.* between Spokane and Pierce Counties so as not to violate the Mr. Yates's right to equal protection?

5. The vagueness doctrine of the Fourteenth Amendment's Due Process Clause requires penal statutes contain objective guidelines to guard against arbitrary enforcement. Where RCW 10.95 *et seq.* contains no guidelines to govern when the death penalty will be sought, the State conceded "there is a lot of subjective analysis" in the decision to seek the death penalty, and the Pierce County Prosecuting Attorney sought the

death penalty for two counts of aggravated murder while three county prosecutors did not even charge aggravated murder for 13 other counts - which the State alleged were part of the same common scheme or plan as the Pierce County charges, are there sufficient guidelines in RCW 10.95 *et seq*. to guard against arbitrary enforcement?

6. The Sixth and Fourteenth Amendments to the United States Constitution, as well as Article. I, §§ 3 and 22 of the Washington Constitution guarantee a defendant the right to a trial by an impartial jury. A trial court infringes a capital defendant's right to an impartial trial under the Sixth and Fourteenth Amendments when it excuses for cause jurors who express conscientious objections to the death penalty, but whose views do not prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions and oath. Where trial court granted the State's challenges for cause to prospective jurors 39, 52, and 74 who voiced their general personal objections to the death penalty, but offered sufficient information from which to ensure they could consider the evidence and to follow the court's instructions and their oaths, did the trial court deny Mr. Yates's his Sixth and Fourteenth Amendment rights to a fair trial?

7. A capital defendant's Sixth and Fourteenth Amendments rights to a fair and impartial jury require removal for cause of jurors who appear

inclined to impose a death sentence without considering mitigating evidence. Jurors 9, 29, 100, and 120, each stated, even after the State's efforts to rehabilitate and sanitize their voir dire, that they would each begin with a presumption of either guilt or that death was the proper penalty upon conviction. Did the trial court deny Mr. Yates's his Sixth and Fourteenth Amendment rights to a fair trial by denying his challenges for cause to these four jurors?

8. A capital defendant has a right rooted in the Due Process Clause of the Fourteenth Amendment to *voir dire* prospective jurors regarding matters which may assist the court and counsel in selecting an impartial jury. Because the exercise of mercy may itself be a mitigating factor, mercy and how an individual juror's religious beliefs have formed his or her notions of mercy were relevant areas of inquiry during *voir dire*. Did the trial court deny Mr. Yates's his right to due process by barring questions regarding the prospective jurors' religious beliefs?

9. For purposes of the Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt, any fact which increases the range of punishment to which defendant is exposed is an element of the offense. Where the aggravating elements of RCW 10.95.020 elevate the punishment for first degree murder to life without

parole, are such aggravating elements of the offense of first degree aggravated murder?

10. A jury instruction which misdefines an element of an offense and thereby relieves the State of its burden of proof denies a defendant his Fourteenth Amendment right to due process. Proof of the common scheme or plan aggravating element required proof that more than one killing occurred and that the deaths were connected by some nexus other than the killer. Instruction 20 permitted the jury to conclude the two murders were a part of a common scheme or plan even if it did not find a nexus between the murders other than Mr. Yates. Instruction 20 also permitted the jury to find each of the two counts were a part of separate plans with one or more of the murders in Spokane, although the State did not identify which murders formed these separate plans. Did Instruction 20 relieve the State of its burden of proving the common scheme or plan aggravating element and thereby deny Mr. Yates due process?

11. A jury instruction which relieves the State of its burden of proof of an element of an offense, denies a defendant his right to due process and to a jury trial under Article I, §§ 3, 21 and 22. The history of these provisions demonstrates they provide greater protection of the right to a jury finding of each essential element beyond a reasonable doubt. Thus, where the State has been relieved of this burden these broader rights

do not permit a finding of "harmless error." Where Instruction 20 relieved the State of its burden of proving each element to the jury beyond a reasonable doubt does such error require reversal?

12. The Fourteenth Amendment's Due Process Clause requires the State prove each element of an offense beyond a reasonable doubt. To prove the common scheme aggravating element the State's evidence must establish a nexus between two or more murders, other than the killer. Where in its best light the State's evidence established only that Mr. Yates killed both Ms. Ellis and Ms. Mercer, did the trial court err and deprive Mr. Yates of due process by entering convictions?

13. To prove the aggravating element that Mr. Yates committed the murder during, in furtherance of, or in the flight therefrom a robbery the State was required to prove Mr. Yates specifically killed Ms. Mercer and Ms. Ellis in order to rob them. Where in its best light the evidence establishes only that no money was recovered from either women's remains, did the trial court err and deprive Mr. Yates of due process by entering convictions?

14. To prove the aggravating element that Mr. Yates committed the murders to conceal the commission of a crime, the State was required to prove Mr. Yates killed Ms. Ellis and Ms. Mercer specifically for that purpose. Where in its best light the State's evidence failed to establish any

intent by Mr. Yates to murder Ms. Ellis and Ms. Mercer to conceal his commission of a crime, did the trial court err and deprive Mr. Yates of due process by entering convictions?

15. For purposes of the Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt, any fact which increases the range of punishment to which defendant is exposed is an element of the offense. Where the finding there are "not sufficient mitigating circumstances to merit leniency" elevates the available sentence for aggravated first degree murder from life without parole to death, is that finding an element of the offense?

16. Article I, § 22 and the Fourteenth Amendment's Due Process Clause require this Court to apply the "essential elements rule" in judging the sufficiency of an information. Under this rule all statutory and nonstatutory elements of an offense must appear in the charging document. Where the Second Amended Information failed to set forth: (1) the absence of mitigation to merit leniency, (2) the elements of first and/or second degree robbery, or (3) define the term common scheme or plan, did the document fail to set forth all essential elements of the crime and thereby deny Mr. Yates of his rights under Article I, § 22 and the Fourteenth Amendment?

17. The Eighth and Fourteenth Amendments require that a jury be instructed that they may convict the defendant on a lesser noncapital offense if a juror could conclude that only the lesser offense was committed. A jury instruction for a lesser degree of an offense consisting of different degrees where evidence presented by either party viewed in the light most favorable to the party requesting the instruction allows a reasonable juror to conclude the defendant committed only the inferior crime and not the greater crime. Did the trial court err in refusing to instruct the jury on first degree murder as a lesser offense of aggravated first degree murder?

18. The Fourteenth Amendment right to due process and ER 402, ER 403, ER 404 and ER 702 together prevent the introduction of irrelevant expert testimony, where the evidence is not helpful to the trier of fact, does not make any fact in controversy more or less likely, and is merely an opinion as to guilt. Did the trial court err in admitting the testimony of Mark Safarik, as expert testimony regarding "linkage assessment," where the sum of his testimony was to rely on the facts of the Spokane cases to identify Mr. Yates as the killer of the victims in Spokane and Pierce Counties, a fact which Mr. Yates had already admitted?

19. The Fourteenth Amendment due process right to a fair trial and ER 406 and ER 702 jointly bar the admission of expert testimony as to

the habits of a given group of people where the purported expert lacks personal knowledge of the subject matter and is instead relying on self-reported statements of members of the subject group as to their normal actions. Did the trial court err in permitting Lynn Everson to testify as an expert regarding the habits of prostitutes when they are with clients, where she lacked first hand knowledge and instead relied on the self-reporting of prostitutes about how they normally conducted their activities?

20. The Sixth and Fourteenth Amendments guarantee a criminal defendant the rights to present a defense, to a fair trial, and to equal protection, including the ability to obtain expert services or testimony where necessary to present that defense. Did the trial court violate these rights when it refused Mr. Yates's request for appointment of an expert to rebut the testimony of the State's "expert" on prostitution?

21. The admission of unduly gruesome and unnecessary photographs may deny a defendant his right to a fair trial under the Fourteenth Amendment Due Process Clause and may also violate ER 402 and ER 403. Where the trial court admitted several irrelevant photographs as well as gruesome photographs which were cumulative and/or unduly prejudicial in light of their limited probative value did the court err and deny Mr. Yates a fair trial?

22. Allowing the display of inaccurate illustrative exhibits or summary charts denies a defendant his right to a fair trial under the Fourteenth Amendment Due Process Clause. Did the display of an extremely large and inaccurate summary chart throughout trial deny Mr. Yates a fair trial?

23. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor engages in misconduct which seeks a verdict based on passion and prejudice, the defendant is denied a fair trial. Did the deputy prosecutors' repeated improper comments during closing argument at trial deny Mr. Yates a fair trial?

24. Did the deputy prosecutor's improper questioning of witnesses on direct and cross examination of several witnesses deny Mr. Yates a fair trial?

25. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor engages in misconduct which seeks a verdict based on passion and prejudice, the defendant is denied a fair trial. Did the deputy prosecutors' repeated improper comments during closing argument at the penalty phase deny Mr. Yates a fair trial?

26. The Fourteenth Amendment Due Process Clause is violated where a sentencing court imposes a sentence in excess of its authority. Where RCW 9.94A.589 requires sentences for serious violent offenses be served consecutively to one another, did the trial court err in ordering the sentences in the Pierce County cases to be served concurrently with the sentences in the Spokane cases?

27. Does RCW 10.95 violate Article I, §§ 3, 4, and 14 as the chapter results in arbitrary and discriminatory imposition of the death penalty of the sort disapproved of in *Furman v. Georgia*?

28. Was the death sentence based on passion and prejudice where the state's penalty phase argument relied on facts other than the crime and factors personal to Mr. Yates?

29. Can this Court address the mandatory review issue proportionality under RCW 10.95.140(2)(b) given the incomplete and inaccurate trial reports compiled for purposes of this review?

30. Are Mr. Yates's death sentences disproportionate to other cases involving similar crimes and similar defendants?

D. STATEMENT OF THE CASE[1]

Robert Yates entered guilty pleas to first-degree murder in the deaths of 10 women and the attempted first-degree murder of another

[1] Facts specific to each issue are included in the argument pertaining to that issue.

woman following a lengthy investigation in Spokane County. Ex. 2. Mr. Yates also entered guilty pleas to first degree murder in three additional killings, two from Walla Walla County and one from Skagit County, that had been unsolved until Mr. Yates's admission. Ex. 2. Mr. Yates attempted to plead guilty to the two murders in Pierce County but was thwarted by the Pierce County Prosecutor's eleventh hour withdrawal from the plea negotiations. RP 635-42.

1. Melinda Mercer. On December 7, 1997, Edward Jamison, who was picking up scrap metal for money, discovered the nude body of Melinda Mercer in South Tacoma. RP 5308-09. A .25 caliber shell casing was found nearby and there were four plastic grocery bags over her head. RP 5370-72, 5379.

In 1997, Ms. Mercer was living in the Seattle area and began working as a prostitute on Aurora Avenue about two weeks before her death. RP 5339-41. Ms. Mercer was last seen the evening of December 6, 1997, on Aurora Avenue in Seattle. RP 5347. According to an associate, Ms. Mercer, who was experiencing withdrawal symptoms from her heroin addiction, planned on obtaining enough money to purchase additional heroin. RP 5347-48.

A subsequent autopsy of Ms. Mercer's body revealed that she had three gunshot wounds to the head. RP 5485, 5497. Sperm located on Ms.

Mercer's body was tied by DNA testing to Mr. Yates. RP 6754. Human hair samples taken from Ms. Mercer's body and from clothing found near her body were tied by mitochondrial DNA testing to Mr. Yates. RP 6327, 6511-12. .25 caliber bullets recovered from Ms. Mercer's body were similar to the bullets that killed several of the Spokane County victims. RP 6409-13. Further, the presence of the plastic grocery bags over Ms. Mercer's head was similar to the presence of bags over the heads of several of the Spokane County victims and was considered unique to Mr. Yates. RP 4877, 5037, 5093, 5179, 5262. Finally, records showed Mr. Yates was present at Fort Lewis from December 5, 1997, through December 7, 1997. RP 6340.

2. Constance Ellis. On October 18, 1998, the body of Constance Ellis was discovered by a search dog and its handler during an unrelated search in the Parkland area for a missing person. RP 5738-41. The body, found off the side of a fairly busy road, although clothed was badly decomposed. RP 5750-53.

An autopsy of Ms. Ellis revealed that the majority of her body had become skeletonized, which led the medical examiner to opine Ms. Ellis had died approximately 30 days prior to the discovery of her body. RP 5905, 5914. The cause of death was determined to be a gunshot to the head, the bullet entering the left side of her head and going through the

brain. RP 5907. The gunshot wound was consistent with a .25 caliber bullet. RP 5930. Ms. Ellis's head was encased in three layers of plastic grocery bags, once again similar to many of the Spokane County victims and similar to Ms. Mercer. RP 5755, 5908. Records revealed Mr. Yates was again present at Fort Lewis from September 18, 1998, through September 19, 1998. RP 6343.

E. ARGUMENT

1. PRINCIPLES OF FUNDAMENTAL FAIRNESS EMBODIED IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BARRED THE STATE FROM SEEKING THE DEATH PENALTY IN THE PRESENT CASE

Prior to July 17, 2000, Mr. Yates engaged in plea negotiations with the State based on the State's expressed position that those negotiations would resolve charges pending in Spokane County, as well as uncharged matters in Spokane, Walla Walla, Skagit, and Pierce Counties. In reliance on the State's promise, Mr. Yates revealed information he would not have otherwise provided.

After the Pierce County Prosecutor's Office filed separate charges, it relied upon the information disclosed by Mr. Yates during the Spokane negotiations to obtain convictions and the death penalty in the present case. Because the State used information provided by Mr. Yates in

reliance on the State's expressed position, to Mr. Yates's detriment, the State was equitably estopped.

Mr. Yates does not argue the State violated the terms of the plea agreement he ultimately entered Spokane in October 2000, or that his Spokane plea was involuntary. Instead, based upon on principals of fundamental fairness and the doctrine of equitable estoppel, he contends he detrimentally relied on assertions by the State in the course of plea negotiations, and as a result the State should have been foreclosed from seeking the death penalty.

a. Mr. Yates relied to his detriment by providing information to the State in the course of the Spokane plea negotiations. In May 2000, the State charged Robert Yates with eight counts of aggravated first degree murder by Information filed in Spokane County Superior Court. RP 630. Ten days to two weeks later, Jack Driscoll, from the Spokane County Prosecutor's Office, contacted Mr. Yates's attorney, Richard Fasy, to determine if Mr. Yates would waive a venue objection and permit an amendment of the Information to include the present Pierce County charges. RP 673. Mr. Yates declined to do so, but indicated he might be willing at a later time. RP 674.

Spokane County Prosecutor Steve Tucker had concerns regarding the State's ability to prove the necessary aggravating factors to obtain a

conviction of aggravated murder or to seek the death penalty. CP 631. Mr. Tucker's concerns were echoed by other experienced capital prosecutors. CP 634.

In early June, Mr. Fasy and Mr. Tucker began plea negotiations. RP 675. Mr. Tucker confirmed the negotiations concerned both the Spokane and Pierce County matters. *Id.*

At a meeting of the Washington Association of Prosecuting Attorneys (WAPA) held in Chelan between June 14 to June 16, 2000, Pierce County Prosecuting Attorney John Ladenburg indicated to Mr. Tucker that Mr. Tucker had authority to resolve the Pierce County matters in Spokane County. RP 632-35.

Based on the belief that the plea negotiations concerned both the Pierce and Spokane matters, and as part of those negotiations, Mr. Yates provided information and agreed to provide additional information regarding several of the pending charges as well as unfiled charges. RP 636-37, 677. Specifically, Mr. Yates admitted he had committed sixteen murders including three in Skagit and Walla Walla Counties, facts not previously known to the State. RP 636-37. Mr. Yates also agreed to disclose the location of the remains of Melody Murfin, a pending, although unfiled, Spokane County charge. Finally, he provided evidence

of two other murders in Spokane County, those of Shannon Zielinski and Heather Hernandez, and the two unfiled Pierce County charges. *Id.*

In late June, Mr. Ladenburg, growing concerned that the ongoing plea negotiations might result in an agreement not to pursue the death penalty, initiated a telephone conference call with Mr. Tucker and several other elected prosecutors. RP 710-11. In the course of this conversation, Mr. Ladenburg expressed his concerns with Mr. Tucker's pursuit of a plea bargain involving the death penalty. Mr. Ladenburg told Mr. Tucker he could not permit Mr. Tucker to prosecute the Pierce County cases if Mr. Tucker thought it acceptable to bargain away the death penalty.[2] RP 713. Mr. Tucker recalled Mr. Ladenburg said only that he thought it too soon to consider a plea bargain in the cases.

Mr. Ladenburg testified that he initiated this conference call solely out of his concern that it was unprincipled and unethical to engage in plea bargaining prior to making a decision whether to seek the death penalty. RP 710-11. Mr. Ladenburg testified that at the time of the telephone conference he did not even if there was a sufficient basis to even charge the Pierce County cases. RP 713. Yet a little over two weeks later Pierce County not only filed an information charging two counts of aggravated

[2] Mr. Ladenburg testified he had never given Mr. Tucker authority to handle the Pierce County matters. RP 709. If no such authority existed, it is not at all clear why Mr. Ladenburg felt compelled to attempt to revoke Mr. Tucker's nonexistent authority to handle the cases.

first degree murder but also gave notice that the State may seek the death penalty. CP 1-6, RP 715.

Following the telephone conference, Mr. Tucker continued to believe he had the authority, and Mr. Ladenburg's approval, to prosecute the Pierce County charges. RP 642, 654, 669-69. Mr. Tucker never expressed any limitation of his authority to Mr. Fasy. Throughout June and early-July, Detective Cal Walker, the head of the Spokane Task Force, understood Pierce County had granted Mr. Tucker authority to resolve the cases. RP 753.

On July 13, 2000, as a result of plea negotiations, Spokane County prosecutors drafted a proposed plea agreement which would resolve fifteen of the sixteen matters, charged and uncharged, arising from Spokane, Pierce, Skagit, and Walla Walla Counties.[3] CP 973-76. A copy of the proposed plea agreement was sent to Mr. Ladenburg for his review. CP 972. Pursuant to the plea agreement Mr. Yates would plead guilty to twelve counts of aggravated first-degree murder (including the Pierce County cases), three counts of first-degree murder, and one count of attempted first-degree murder, and in exchange the State would not seek the death penalty. CP 973. In exchange for Mr. Yates's guilty plea, the State agreed to recommend consecutive standard range sentences for each

[3] The agreement dismissed the murder charges regarding Shawn McClenehan, to permit the State to refile the charge if Mr. Yates violated the terms of the agreement.

count. *Id.* A plea hearing was set for July 20, 2000, in Spokane County Superior Court. RP 679.

Contemporaneous to, or shortly before, the finalization of the agreement between Mr. Yates and the Spokane Prosecutor, the Spokane County detectives who had investigated the case met with Mr. Ladenburg and Gerald Horne, the chief criminal deputy prosecutor in Pierce County. At that meeting the detectives expressed their concern with the pending plea agreement. RP 739. After that meeting, someone from the Pierce County Prosecutor's office contacted Detective Walker to confirm that in fact the charges were quickly moving towards a resolution by way of plea. RP 755.

Mr. Ladenburg maintained that prior to meeting with the Spokane detectives he had already resolved to file the two Pierce County cases separately. RP 739. However, Mr. Ladenburg was unable to say when this decision was made. Nonetheless, after receiving the proposed plea agreement on July 13, and despite his claim that he never gave Mr. Tucker authority to handle the Pierce County cases, Mr. Ladenburg did not express any concern or surprise that the agreement explicitly included the Pierce County charges. CP 973; RP 714. Mr. Ladenburg did not contact Mr. Tucker to question why the plea agreement included the Pierce County charges. *Id.* Instead, even though two weeks earlier he claimed to

be so unfamiliar with the case as to not even know if the matters were chargeable offenses, Mr. Ladenburg instructed his office to file the present two charges with a special sentencing notice. RP 713, 715.

On July 17, 2000, the Pierce County Prosecutor, without any prior discussion with Mr. Tucker or others involved in the plea negotiations, filed an Information charging Mr. Yates with two counts of aggravated first-degree murder with the special sentencing notice. CP 1-6. Mr. Tucker stated he was surprised by Mr. Ladenburg's actions as he assumed he still had authority to handle the Pierce County matters. RP 642. Mr. Tucker expressed his frustration with the lack of cooperation among counties to the head of WAPA, who in turn arranged for Mr. Ladenburg to contact Mr. Tucker. CP 646. The following day, Mr. Ladenburg telephoned Mr. Tucker and stated he filed the charges separately because he had changed his mind. RP 646.

Mr. Yates and Mr. Tucker then started their negotiations anew which ultimately resulted in guilty pleas to thirteen counts of first-degree murder in Spokane, Skagit, and Walla Walla Counties. CP 867-70. Mr. Fasy testified that he and the other attorneys did not feel there was any other realistic option in light of the disclosures Mr. Yates had made to that point on the promise of a global resolution. RP 680.

On December 18, 2000, Mr. Yates moved for discovery of conversations between the Spokane and Pierce County prosecutors' offices regarding the plea negotiations. RP 78. The State response was twofold. First, the State asserted no such material existed. The deputy prosecutor stated "the Pierce County Prosecutor's Office had zero, zip, no involvement whatsoever in the disposition of the Spokane plea bargain. So there is nothing there to be discovered . . . ." RP 80. Second, the State claimed that if there was such material, it was privileged as work product. RP 79-80. The trial court denied the motion, permitting Mr. Yates to renote it at a later date. RP 83.

Mr. Yates filed a motion to equitably estop the State from pursuing the death penalty in the Pierce County matters. CP 701-04. In support of this motion, Mr. Yates included declarations from Mr. Tucker and Mr. Fasy. CP 705-12. The State offered a declaration from Mr. Ladenburg which stated in part "I have read the declaration filed by Steve Tucker and Richard Fasy in this case. I dispute much of what they relate." CP 847. Mr. Yates argued an evidentiary hearing was necessary in light of the discrepancies between Mr. Tucker and Mr. Ladenburg's recollection of events. RP 461-65. To illustrate the discrepancies, Mr. Yates pointed out that Mr. Ladenburg's declaration was silent as to his meeting with the Spokane detectives on July 12 or 13, 2000.

Despite the acknowledged factual conflicts, the Pierce County Prosecutor's Office maintained there was no reason to conduct an evidentiary hearing to resolve the matter. RP 488. The Pierce County prosecutors contended Mr. Tucker lacked any credibility, and responded – only to be contradicted by Mr. Ladenburg's subsequent testimony - "the reason there is nothing in [Mr. Ladenburg's] affidavit about [his July 2000 meeting with Spokane detectives] is that Mr. Ladenburg did not meet with any police officers from Spokane in July of 2000." RP 495. The Pierce County prosecutors asserted they had no intention of using the Walla Walla or Skagit murders. RP 498. The trial court ruled that a hearing would be necessary to resolve the evidentiary issues. RP 500-01.

Despite their earlier assurances that no such documents existed (*See e.g.* RP 80) just three hours after the trial court determined an evidentiary hearing was necessary, the Pierce County prosecutors provided Mr. Yates with copies of additional communications between the Spokane and Pierce County prosecutors concerning the plea negotiations. CP 966-67; RP 536. The Pierce County prosecutors claimed the documents had only been discovered during the lunch recess. RP 536.

b. <u>The trial court's findings fail to properly identify or analyze the issue</u>. A visiting judge, the Honorable Gordon Godfrey of Gray's Harbor County, conducted the evidentiary hearing after denying

the State's motion to reconsider the necessity of an evidentiary hearing. Judge Godfrey found that as of the WAPA conference in mid-June, "Mr. Tucker believed and had reason to believe that he had authority to prosecute the Pierce County [cases] . . . Mr. Tucker subsequently conveyed that understanding to . . . Mr. Fasy." CP 2745.[4] Judge Godfrey concluded that the authorization was revoked during the telephone conference in late-June. CP 2745.

Judge Godfrey did not find that any revocation, whether implied or expressed, was ever communicated to Mr. Yates or his attorneys. Judge Godfrey did not address the fact that even the lead investigator of the Spokane cases, Detective Walker, continued to believe in July 2000 that Mr. Tucker had authority to resolve the Pierce County cases. Judge Godfrey did not address the fact that Mr. Tucker himself continued to believe he had such authority, as expressly stated in his testimony and declaration and as made clear by the fact that the plea agreement he and Mr. Fasy drafted in mid-July included the Pierce County cases.

Further, Judge Godfrey's ruling did not address the fact that if on June 28, Mr. Ladenburg had decided to file the Pierce County charges separately, he did not share that information with his own office. Mr. Ladenburg testified that he did not even inform Gerald Horne, the lead

[4] Judge Godfrey's Findings of Fact and Conclusions of Law are attached as an appendix.

Pierce County prosecutor in the case, of the decision until either the time of the July 12 meeting with Spokane detectives or perhaps shortly before then. RP 739-40.

Moreover, Judge Godfrey's conclusion that Mr. Ladenburg revoked the authority granted Mr. Tucker ignored Mr. Ladenburg's own testimony that he had never granted such authority in the first place. Judge Godfrey's Solomonic compromise is simply not supported by the record. The facts are either Mr. Tucker was granted authority which was never revoked or, according to Mr. Ladenburg, no authority was ever granted and thus no revocation was necessary.

Judge Godfrey concluded that because Mr. Yates had not pleaded guilty prior to the filing of the Pierce County Information, Pierce County was free to pursue the charges. CP 2747. The court also concluded Mr. Yates's remedy was to return to Spokane County to seek to withdraw his guilty plea. *Id.*

c. Due process principles and rules of contract apply to the plea bargaining process. The Fourteenth Amendment's due process guarantee requires the plea bargaining process comport with principles of fairness and due process. U.S. Const. Amend. XIV; Const Art. I, § 3; *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *State v. Sledge*, 133 Wn.2d 828, 839-40, 946 P.2d 1199 (1997). In

*Santobello*, the Court recognized that because of the important constitutional rights which are to be bargained away, the plea bargaining process "presupposes fairness in securing agreement between the accused and the prosecutor." 404 U.S. at 261. "As a general rule, fundamental fairness means courts will enforce promises made during the plea bargaining process that induce a criminal defendant to waive his constitutional rights." *Staten v. Neal*, 880 F.3d 962, 963 (7th Cir. 1989); *see also*, *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991); *United States v. Barnes*, 278 F.3d 644, 648 (6th Cir. 2002). Fairness in the plea bargaining process is essential to ensure "the honor of the government [and] public confidence in fair administration of justice." *State v. Bryant*, 146 Wn.2d 90, 104, 42 P.3d 1278 (2002), (citing *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974)); *Sledge*, 133 Wn.2d at 839.

"Every agreement by which a[n] . . . accused waives the Fifth Amendment right against self-incrimination is subject to fundamental fairness under the due process clauses of the Fifth and Fourteenth Amendments." *Bryant*, 146 Wn.2d at 104.

> In general, "fundamental fairness and public confidence in government officials require that [the government] be held to 'meticulous standards of both promise and performance.'" *Palmero v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) (quoting *Correale v. United States*, 479 F.2d

> 944, 947 (1st Cir. 1973)). Therefore, the principle of "fundamental fairness" may require the government to perform a promise made by an agent which exceeded his actual authority. *United States v. Bemis*, 30 F.3d 220, 221 (1st Cir. 1994)

*Bryant*, 146 Wn.2d at 105.

d. Due process and fundamental fairness precluded the State from pursuing the death penalty for the Pierce County charges.

When prosecuting criminal violations of the laws of the State of Washington, Washington prosecutors represent and are agents of the State not individual counties. *Whatcom County v. State*, 99 Wn.App. 237, 247-49, 993 P.2d 273, *review denied*, 141 Wn.2d 1001 (2000). Indeed, each elected prosecutor has authority to prosecute and resolve any felony committed anywhere in the State, subject to a venue objection by a defendant. *Bryant*, 146 Wn.2d at 103 (citing *State v. Dent*, 123 Wn.2d 467, 472, 869 P.2d 392 (1994)).

Thus, the plea negotiations headed by the Spokane County Prosecutor's Office in the Spring and early-Summer of 2000 were negotiations between the State of Washington and Mr. Yates. As such the due process obligation of fair dealing applied to the State of Washington as a whole and not just the Spokane County Prosecutor's Office. *Santobello* makes clear that due process is not implicated solely upon the entry of a plea or upon reaching a final agreement. Rather the Court

recognized that because of the important constitutional rights which are to be bargained away, the plea bargaining process "presupposes fairness **in securing agreement** between the accused and the prosecutor." (Emphasis added.) *Santobello*, 404 U.S. at 261. "[F]undamental fairness and public confidence in government officials require that [the government] be held to 'meticulous standards of both promise and performance.'" *Palmero v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976), (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973)); *Bryant*, 146 Wn.2d at 105.

The actions of the state, most specifically the Pierce County Prosecutor's office, fell far short of the "meticulous standards of both promise and performance" demanded by the Fourteenth Amendment. The State led Mr. Yates to believe that its negotiations with him would resolve all counts against him in all four counties involved. Judge Godfrey's findings establish that this was so at least until June 28, 2000. CP 2745. Further, the testimony of every state agent involved, other than Mr. Ladenburg, established this remained the case even after June 28, 2000. *See* RP 664, 668-69, 753. And Mr. Fasy testified this remained his belief throughout the June and early-July when Mr. Yates continued to provide information to the State and up to the point he learned charges were separately filed in Pierce County.

Based on this belief, which the State's assurances reasonably created, the State obtained Mr. Yates's admission that he had committed the 10 murders in Spokane County, an attempted murder in Spokane County, two previously unlinked and uncharged murders in Walla Walla County, one previously unlinked and uncharged murder in Skagit County, and two then uncharged murders in Pierce County. Based on the State's promises and assurances Mr. Yates embarked on a course from which he could not retreat after the State failed to honor its promises on the eve of formal entry of the guilty plea. RP 680.

The State might respond Mr. Yates remained free to terminate all plea negotiations and proceed to trial on all counts. But such a simplistic view fails to recognize the realities of any case much less a case as complex as this.

Mr. Yates had acknowledged his guilt in three murders to which the State had previously not linked him. To simply dismiss that disclosure by claiming those offenses could not be charged based solely on Mr. Yates's admission ignores two important points. First, armed with Mr. Yates's admission, authorities in those counties may well have developed additional information upon which charges could be based. Second, regardless of whether those offenses might ever have been charged, the litigation process, especially in a complex case such as this, is not so

simple as to be a matter of charging and resolution of offenses. Rather, the relative positions of the parties, and the strength of those positions, is affected by each and every disclosure made. While admissions made in the course of plea negotiations may not be admissible as evidence, the fact that they were made will generally not be ignored by the State in its prosecution, in terms of additional investigation, its view of the strength of its case, and any number of other considerations that impact how attorneys try or resolve cases. And this is most certainly the case here.

After reasonably and in good faith relying on the State's promises and engaging in nearly two months of plea negotiations, Mr. Yates could not be returned to anything even approximating the position he was in before the negotiations began, simply by the State's uttering "never mind." The State wrung every bit of information it could from Mr. Yates and waited until the last possible moment to pursue separate charges in Pierce County.

If in fact the State had elected to pursue separate charges in Spokane and Pierce Counties, simple notions of fairness demand that at a minimum that decision should have been formally and plainly communicated to Mr. Yates at the earliest possible moment. It never was. Unfortunately the Pierce County Prosecutors and the trial court viewed this problem as a feud between two county prosecutors, ignoring the much

more important fact that this internal squabble had a very real and lasting impact on the party with whom the State was negotiating. Judge Godfrey concluded Mr. Ladenburg's purport revocation of his consent on June 28, 2000, somehow resolved the question. Even assuming the conclusion were supported by the record, if that revocation of authority was never communicated to Mr. Yates, the problem remains, and Judge Godfrey never addressed this critical point. That the State resolved its internal power struggle does not begin to address the question of what harm Mr. Yates suffered when he continued to reveal information even after the purported revocation based upon the assurance that the negotiations would resolve all matters.

The actions of the State of Washington fall far short of the "meticulous standards of both promise and performance" which due process requires. *See, Bryant*, 146 Wn.2d at 105. The State's actions undercut any presupposition of "fairness in securing agreement between the accused and the prosecutor." *Santobello*, 404 U.S. at 261.

e. The only effective remedy for the State's actions is to dismiss the death penalty. The most fundamental notions of fairness require reversal of Mr. Yates's death sentence.

The argument advanced by the State and adopted by Judge Godfrey, that Mr. Yates's sole remedy was to withdraw his plea in

Spokane, is both legally unsupportable and wholly at odds with the principle of fundamental fairness. Such a conclusion amounts to nothing more than an endorsement of the view that the State can engage in plea negotiations with a complete lack of candor or fair play, obtain as much benefit as it can, and, so long as a plea agreement is not formally entered, the State has no obligation whatsoever to honor any prior promises and the defendant is left with no meaningful remedy.

Certainly withdrawing his guilty plea in Spokane so that he can face trial on 10 additional counts of aggravated murder in addition to the two counts of which he was convicted in Pierce County does not place Mr. Yates in the position he was in prior to July 17, 2000, when he made the mistake of taking the State at its word. Such a remedy completely fails to hold the State to the meticulous standards which due process demands, as it permits the State to benefit from its improper actions and thus undermines public confidence in the government. Such a remedy merely compounds the violation.

While there is nothing which can completely return him to the position he occupied before entering plea negotiations with the State, the remedy which can rectify the harm, protect the integrity of the plea bargaining process, and does not permit the State to benefit from its misdeed is to bar the death sentence in the present cases.

Cases which have addressed the due process implications in the plea bargaining process have recognized that when violated, due process may require a remedy not otherwise available. In *Bryant*, this Court recognized that even if an immunity agreement did not legally bind a county prosecutor who was not expressly included in the agreement, fundamental fairness did.[5] 146 Wn.2d at 105. In *State v. Sanchez*, the Court concluded due process required an investigating police officer be bound by the terms of a plea agreement, unless expressly excluded, even though the officer had no role in negotiations and was statutorily authorized to speak at sentencing. 146 Wn.2d 339, 46 P.3d 774 (2002). In *State v. Miller*, the Court required that where a prosecutor agreed to recommend a sentence that the trial court could not lawfully impose, due process required not only that the prosecutor make the recommendation but that the trial court impose the unlawful sentence. 110 Wn.2d 528, 756 P.2d 122 (1988).

Federal courts too have broadly interpreted the remedies demanded by such violations. *See e.g., Palmero*, 545 F.2d at 296-97 (immediate release of petitioner was only sufficient remedy where prosecutor had failed to complete agreed act which was beyond prosecutorial authority);

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[5] In addition to the two justice "majority" opinion, four other members of the Court agreed with the result but concluded the agreement did in fact bind prosecutors in both counties.

*United States v. Carillo*, 709 F.2d 35, 37 (9th Cir. 1983) (recognizing that dismissal of indictment was proper and effective remedy for government's failure to comply with cooperation agreement).

Each of these cases demonstrate that where the government fails to meticulously honor the assurances made to the defendant, and that due process will require the fashioning of a remedy which places the defendant in a position as close as possible to the position he would have occupied had the State kept its promises. This Court should dismiss the sentence imposed in these cases.

2. THE DOCTRINE OF EQUITABLE ESTOPPEL BARRED THE STATE FROM SEEKING THE DEATH PENALTY IN THE PRESENT CASE

a. The doctrine of equitable estoppel applies to the plea bargaining process. In addition to the requirements of fairness and due process, plea bargaining and plea agreements are subject to contractual principles. *Sledge*, 133 Wn.2d at 838. The doctrine of equitable estoppel requires that where a party makes a definite representation to another, and the second party reasonably relies on that representation to his detriment, the first party will not be permitted to take a contrary position at a later point where doing so would injure the second party. *See, Heckler v. Comm'ty Health Serv. of Crawford Cy., Inc.*, 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984) (citing *Restatement (Second) of Torts*, §894(1)

(1979)). A party seeking to apply equitable estoppel against the government must establish (1) the government has acted in a manner inconsistent with its prior position or statement; (2) the party justifiably relied upon the government's prior position; (3) the individual would suffer injury if the government is allowed to repudiate its prior position; (4) estoppel is necessary to prevent a manifest injustice; and (5) application of estoppel will not impair government functions. *Kramarvcky v. Dept. Social and Health Serv.*, 122 Wn.2d 738, 743, 863 P.2d 855 (1993).

b. The State was equitably estopped from seeking the death penalty. In the case at hand, Mr. Yates established each of the elements of equitable estoppel. The trial court's ruling to the contrary was incorrect.

*i. The State took a position contrary to its prior position*. The trial court found Mr. Ladenburg had authorized Mr. Tucker to resolve the Pierce County matters in Spokane. CP 2745. Mr. Tucker conveyed this authority to Mr. Yates. CP 2745.

While the trial court concluded Mr. Ladenburg revoked his grant of authority during the June 28, 2000, telephone conference there is no finding that this was in turn communicated to Mr. Yates or anyone else. At no time prior to July 17, 2000, was Mr. Yates told anything other than

that the Pierce County matters would be resolved in the Spokane plea negotiations. Indeed, up to that point, all the parties and individuals actively engaged in the Spokane plea negotiations believed those negotiations would resolve the Pierce County matters as well: Mr. Tucker believed he had authority to resolve the Pierce County matters and "was a little surprised" when the present charges were filed in Pierce County. RP 664, 668-69. Detective Walker, head of the Spokane County Sheriff's Office Task Force investigating the crimes, also continued to believe the Spokane negotiations would resolve the Pierce County matters. RP 753. Mr. Ladenburg's testimony was that he did not share with his own office staff his intent to separately file the Pierce County charges until some time around July 12, 2000. RP 739-40. Further, Mr. Ladenburg testified that the day after the Pierce County charges were filed he telephoned Mr. Tucker and "just said 'we are filing our cases and will send you a copy.'" RP 716. Mr. Tucker recalled Mr. Ladenburg saying he filed the charges separately because he had changed his mind. RP 646. If Mr. Ladenburg had revoked his grant of authority on June 28, it is entirely unclear why he telephoned Mr. Tucker on July 18 to tell him he had decided to separately file charges. It is entirely unclear why Mr. Ladenburg did not even raise a question regarding Mr. Tucker's preparation of a plea agreement which

included the Pierce County matters when Mr. Tucker supposedly lacked the authority to do so.

Most importantly, and regardless of the foregoing, Mr. Yates continued to believe that his negotiations with Mr. Tucker would resolve the Pierce County cases. The beliefs and intentions of the parties is demonstrated by the proposed plea agreement, drafted July 13, 2000, which specifically stated it would resolve the matters in Spokane, Pierce, Skagit, and Walla Walla Counties. CP 973.

The separate prosecution of the current charges was a position directly contrary to that taken by the State prior to July 17, 2000.

*ii. Mr. Yates justifiably relied upon the government's prior position.* At all times prior to July 17, 2000, Mr. Yates was told the Spokane County plea negotiations would resolve the Pierce County matters. Mr. Yates had no reason to doubt this was the case, as Mr. Tucker himself believed this was so. RP 664. So too did Detective Walker. RP 753.

Mr. Yates's belief that the plea negotiations would result in a settlement of all counts was further confirmed by the fact that the Skagit and Walla Walla County prosecutors submitted letters indicating the Spokane negotiations would resolve the cases in those counties as well. Indeed it was only in response to the request for such a letter that Mr.

Ladenburg for the first time stated that Pierce County would separately file the present charges.

In light of the fact that every principal player in this case, other than Mr. Ladenburg, continued to believe that the Spokane negotiations would resolve all charges against Mr. Yates, Mr. Yates's reliance on the State's assertions was entirely justified.

Moreover, Mr. Yates's reliance was legally justified: every county prosecutor in Washington has authority to prosecute felonies arising anywhere in the state. *Bryant*, 146 Wn.2d at 103.

*iii. Mr. Yates suffered injury as a result of the government's repudiation of its prior position.* In the course of the Spokane plea negotiations, Mr. Yates admitted he had committed eleven murders in Spokane County, two each in Walla Walla and Pierce Counties, and one in Skagit County. Mr. Yates disclosed this information taking the State at its word that the negotiations would resolve the Pierce County matters as well as the Spokane, Skagit, and Walla Walla cases.

After Pierce County reneged on its earlier assurances, Mr. Yates continued in plea negotiations as he believed he had provided too much information to the State and it was too late to realistically go to trial. RP 680. As discussed already, once a person admits to having committed 15 murders, that admission by itself, whether admissible or not, will

necessarily and fundamental alter the remainder of the process, from the relationship of the parties to the investigation and presentation of evidence. But that is not the only harm Mr. Yates suffered.

The State, and the trial court, relied on the fact of Mr. Yates's subsequent guilty pleas, generated as they were by the State's false assurances, to foreclose any factual challenge to the evidence which the State offered to establish the common scheme aggravating factor in the present cases. RP 186-87, 242. During the penalty phase, the State relied on Mr. Yates's admission to the murders in Skagit County and Walla Walla County in its argument for the death penalty. RP 7711. As proof of the aggravating factor, the State included the murders of Shannon Zielinski, Heather Hernandez, and Melody Murfin, murders with which Mr. Yates was not charged at the time he admitted his responsibility for their commission. The State would have never even recovered Ms. Murfin's remains but for Mr. Yates's agreement to direct police to them.[6]

This evidence was certainly injurious to Mr. Yates as it allowed the State to seek, and the jury to impose, the death penalty. Mr. Yates detrimentally relied on the State's prior position.

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[6] Police had searched Mr. Yates's residences for a period of 35 days without discovering the remains.

*iv. Estoppel is necessary to prevent a manifest injustice.* Courts have not truly defined the term "manifest injustice" in the context of equitable estoppel. However, cases finding a manifest injustice demonstrate the need to estop the State in the present case.

In *Kramarvcky*, the Court denied the State's effort to recoup welfare overpayments. 122 Wn.2d at 743-49. The Court determined repayment would effect a manifest injustice on the recipients because they had done nothing to gain the overpayment, had no reason to believe they were receiving overpayment, and lacked the ability to repay without compromising their ability to meet their basic needs. *Id.* at 748-49.

In another case, the Court estopped the State from collecting unpaid excise taxes from the purchaser of a business. *Harbor Air v. Bd. of Tax Appeals*, 88 Wn.2d 359, 560 P.2d 1145 (1977). At the time of purchase, the State indicated to the purchaser there were questions as to unpaid excise taxes for the one year preceding the sale. *Id.* at 362. However, after purchase was complete, the State sought to collect unpaid taxes for a several-year period preceding the purchase. *Id.* at 363. The Court concluded that to permit collection beyond the one year period raised at the time of purchase would result in a manifest injustice. *Id.* at 367-68.

If recoupment of welfare overpayments or collection of unpaid taxes would result in a manifest injustice, the same must be true where the State seeks to execute an individual based upon information gained through the individual's reliance on the government's assurances which it then abandons. To permit the imposition of the death penalty in this case would result in a manifest injustice.

*v. Application of estoppel will not impair government functions.* Preventing the State from seeking the death penalty in the present case will not impair any government function. Mr. Yates's convictions will stand and he will be fully accountable for the crimes he has committed. Indeed, application of estoppel in this case will serve to enhance government functions by assuring defendants no matter what their crime that they can engage in plea negotiations with the State of Washington without fear of suffering irreparable harm if the Pierce County Prosecutor's Office will not meticulously honor its word. Estoppel will not result in any impairment of government functions.

*vi. Mr. Yates has satisfied the elements for equitable estoppel.* As set forth above, Mr. Yates has satisfied each of the elements of equitable estoppel. Mr. Yates has established that he relied on the State's assurances and that he was injured by the State's subsequent change in position.

c. Reversal is required. The trial court misanalyzed the question of estoppel and instead focused on the terms of the plea agreement. The trial court seemingly believed Mr. Yates was alleging the State had breached the terms of the October 2000 plea agreement. The court concluded Mr. Yates's only remedy was to seek to withdraw or enforce his guilty pleas in Spokane County. CP 2747. The court also found that because a plea agreement is not final or binding on the parties until accepted by the trial court, and Pierce County withdrew from the plea negotiations before that occurred, the State could not be estopped in the present case. *Id.*

The trial court's focus on the plea agreement as opposed to the plea negotiation manifested a fundamental misapprehension of the argument presented, as well as the concept of equitable estoppel. While it is a contract principle, estoppel can only apply in the absence of a contract. *Carew, Shaw & Bernasconi v. General Casualty Co. of America*, 189 Wash. 329, 336, 65 P.2d 689 (1937) (estoppel cannot create liability contrary to or in addition to that in a contract). Where there is a final and valid contract, questions of obligations are resolved by the terms of the contract itself. *Id.* It is only where there is no contract that questions of reasonable reliance and the actions of parties are relevant.

Mr. Yates does not contend the Pierce County prosecution violated the terms of the plea agreement he entered in Spokane County. Instead, he contends that prior to July 17, 2000, when the Pierce County charges were filed, he relied on the State's assurances that the plea negotiations would resolve the Pierce County charges. Relying on these assurances, Mr. Yates provided damning evidence which the State used to obtain the death penalty. Mr. Yates satisfied the elements of equitable estoppel. Mr. Yates's death sentences should be vacated.

3. THE ABSENCE OF ANY STANDARDS IN RCW 10.95 *et seq.* GOVERNING THE PROSECUTOR'S DECISION TO PURSUE THE DEATH PENALTY DEPRIVED MR. YATES OF EQUAL PROTECTION AND RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED TO HIM

a. The Fourteenth Amendment's Equal Protection and Due Process Clauses require uniformity in the prosecutorial decision to pursue the death penalty and objective guidelines governing the decision-making process. The Equal Protection Clauses of the United States and Washington Constitutions require that similarly situated person receive similar treatment. U.S. Const. Amend. XIV; Cons Art. I, §12; *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *In re Personal Restraint of Mota*, 114 Wn.2d 465, 473, 788 P.2d 538 (1990), (citing *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978)). If

there is a disparity in the treatment of individuals accused of the same crime, the law requires that, at minimum, there must be a rational basis for such disparity. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (law establishing reimbursement for indigent appeals irrationally discriminated between persons who were confined for offenses and those that were not).

The vagueness doctrine of the due process clause requires a statute provide "sufficient definiteness" such that persons of common intelligence need not guess at the statute's meaning and to discourage arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983). The second principle of the doctrine, the prevention of arbitrary application, is the doctrine's "more important aspect." *Id.* at 358. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); *see also, Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (requiring "clear and objective standards" which provide "specific and detailed guidance" in capital sentencing).

b. Because RCW 10.95 *et seq.* permits grossly disparate results with no rational basis, and invites unfettered discretion by prosecutors the chapter violates the Equal Protection and Due Process Clauses. The location of the prosecution alone made a blatant difference as to whether or not Mr. Yates faced the death penalty.

Spokane, Skagit and Walla Walla prosecutors agreed to forego the death penalty because they concluded the evidence could not support the aggravating factors. RP 632-34. These concerns were echoed by other capital prosecutors from around the State. RP 634. Yet the Pierce County charges were filed alleging precisely the same aggravating factors. The sole basis for this disparity was the subjective decisions of prosecuting attorneys.

The State's central theory at trial was that Mr. Yates had committed 15 crimes throughout the State of Washington and these multiple murders evidenced a common scheme or plan which in turn established the aggravating element supporting imposition of the death penalty. The State asserted these crimes were so similar that the ten Spokane offenses were offered to prove the a common scheme of which the Pierce County murders were only part, and to establish the common scheme aggravating element of RCW 10.95.020(10). If the crimes were in fact so similar, there is no rational basis which justifies the disparate

treatment of these crime between Pierce County on one hand, and Skagit, Walla Walla and Spokane Counties on the other. There is no rational basis which explains why the ten Spokane murders did not even merit convictions of aggravated murder yet the two offenses in Pierce County warranted the death penalty.

The State contended below that disparate treatment in the form of the effort to seek the death penalty in Pierce County was warranted because

> . . . there are significant differences in the posture of those cases when they were presented to the various prosecutors. Mr. Yates presented in Spokane as an individual with no prior criminal history. The prosecutor obviously engaged in a manner of plea bargaining that Mr. Ladenburg disapproved of, but nevertheless, he had no criminal history.
>
> When Mr. Yates came to Pierce County and the prosecutor considered the death penalty, the case stood in stunning contrast to the Spokane case . . . . When the case came to Pierce County, the defendant had more than a dozen convictions for first degree premeditated murder. He had a conviction for attempted first degree murder. That factor, in and of itself, is stunningly different from the case in Spokane and an appropriate basis for the prosecutor to - - an appropriate factor or the prosecutor to give great weight to in deciding to seek the death penalty.

RP 521-22, *see also*, CP 769-70.

In fact, until the State reneged on its assurances, the Pierce County cases were going to be treated the same as the Spokane, Skagit and Walla Walla cases. As the murders of Ms. Ellis and Ms. Mercer were not the last

in the series, the State cannot assert their commission evinced some heightened degree of culpability meriting a harsher response. It was only the State's actions which ensured Mr. Yates had the criminal history he did before he arrived in Pierce County. Rather than justify the disparate treatment of Mr. Yates's offenses, this illustrates additional constitutional frailties in the effort to obtain the death penalty in this case.

In a further effort to defend the decision to pursue Mr. Yates's death, the Pierce County prosecutors claimed "there is a lot of subjective analysis" in the decision to seek the death penalty but this subjective discretion is sufficiently guided. RP 520. The State was certainly correct to concede "there is a lot of subjective analysis" but incorrect in its conclusion that the disparity in Mr. Yates's treatment was merely a difference of opinion among reasonable minds.

One group of prosecutors concluded the appropriate charge and resolution was first degree murder with standard range sentences. However, a lone prosecutor concluded the appropriate charge and resolution was aggravated first degree murder with the death penalty. Yet each of these decisions was based upon the same acts. In fact, as it involved only two deaths as opposed to 13, the later decision was even less supportable. There is no rational basis for this difference. There are no objective guidelines which permit these grossly disparate results. This

was not merely a difference between reasonable minds, but a conclusion which can only be reached due to the unfettered latitude granted to prosecutors by RCW 10.95 *et seq*.

In *Bush v. Gore*, the Supreme Court noted that local governments could independently develop different systems for carrying out elections without running afoul of the Equal Protection Clause. 531 U.S. 98, 109, 121 S.Ct. 525, 531-32, 148 L.Ed.2d 388 (2001). The Equal Protection Clause was violated, however, where the state supreme court "with power to assure uniformity" failed to do so and thus failed to assure these different systems met the requirement of equal treatment and fundamental fairness. *Id.*

As did the Florida court in *Bush*, this Court has the "power to assure uniformity" because this Court is statutorily charged with assuring the proportionality of a death sentence. RCW 10.95.130; RCW 10.95.140. There are no published standards in statutes or caselaw providing guidance for the decision to seek the death penalty. Mr. Yates requested an evidentiary hearing to determine the standard employed by the 39 elected prosecutors but the court refused. RP 535. Because RCW 10.95 *et seq*. provides no means of assuring consistent treatment among counties of the decision to seek the death penalty it violates the Equal Protection Clause. Additionally, because the chapter lacks objective guidelines to guard

against unfettered discretion it is unconstitutionally vague as applied to Mr. Yates.

4. THE TRIAL COURT VIOLATED MR. YATES'S RIGHT TO A FAIR AND IMPARTIAL JURY.

a. State's challenges granted.

*i.* Joan Rodrigues. Ms. Rodrigues, Juror 39, initially candidly admitted her personal opinion was that she was opposed to the death penalty in every possible circumstance. RP 2276. She later admitted in questioning by the State that although she felt the death penalty was harsh, she could consider voting for the death penalty. RP 2277. Again while undergoing questioning by the State, Ms. Rodrigues stated that if the evidence pointed to the death penalty she would vote for death. RP 2279. She agreed this answer was contradictory but stated she was not opposed to the death sentence in every possible circumstance but was open to it if it fit the crime. RP 2280. She stated she would listen to all of the evidence and follow the court's instructions. RP 2282. The court wrongfully excused Ms. Rodrigues, ignoring her statements that she could listen to the evidence and follow the court's instructions. RP 2286.

*ii.* Evelyn Brown. Ms. Brown, Juror 52, volunteered she was a lifetime member of the Church of God and Christ, which opposes the taking of a life. RP 2403-04. She stated this was her

personal belief as well. RP 2409. Later she stated that given these beliefs it would make her uncomfortable to vote on whether or not a person should or should not be executed. RP 2412. But she also candidly admitted she could set aside her beliefs, listen to the evidence and follow the law as given to her by the judge in the jury instructions. RP 2414. She admitted she could do this even in light of her strongly held beliefs. RP 2415.

Once again ignoring the answers provided by the juror, the court excused Ms. Brown for cause, focusing solely on her religious beliefs and opinions. RP 2418.

*iii.* Nancy Dealba. Ms. Dealba, Juror 74, testified she opposed the death penalty on religious and philosophical grounds. RP 2685-86. But she further testified she had been on a jury in a prior case and was able to set aside her personal feelings and follow the court's instructions. RP 2687. She felt she could do the same in the present case. RP 2687-88. Once again ignoring Ms. Dealba's prior jury experience and her promise to follow the court's instructions, the court found her beliefs would substantially impair the performance of her duties as a juror and excused her for cause over defense objections. RP 2691.

b. Defense challenges denied.

*i.* Jeanette Thornburg. Ms. Thornburg, Juror 9, testified that if there was no question about the guilt of the defendant, she firmly believed the death penalty was appropriate. RP 1865-66. She further admitted that making a decision for life imprisonment without parole would be a very difficult decision for her to make but she thought she could make it. RP 1869. But she reiterated that if the defendant had committed multiple murders she presumed the death penalty was the proper sentence. RP 1870, 1872. Even after the State's attempt to rehabilitate Ms. Thornburg with questions about the bifurcated trial and burdens of proof, Ms. Thornburg still held to her previously stated beliefs:

> Q: Where it is premeditated murder?
> A: Probably do the death penalty, but I could also do life imprisonment with no parole.
> Q: But you presume the death penalty was the proper sentence?
> A: Yes, well - -

RP 1877.

Despite Ms. Thornburg's strongly held presumption that death was the proper penalty for multiple murders, the court refused to excuse her for cause, finding she did not state she would presume the death penalty was the proper sentence and she stated she would follow the court's instructions. RP 1882-83. The absurdity of the court's conclusion is

vividly pointed out in the questioning by the defense where Ms. Thornburg stated she would presume the sentence would be death. RP 1870, 1872, 1877.

*ii.* Martha Alexander. Ms. Alexander, Juror 29, admitted that she believed the death penalty appropriate for people who kill children and serial killers. RP 2106. She agreed with the State of Florida's execution of Ted Bundy and presumed people who commit multiple premeditated murders should be sentenced to the death penalty. RP 2112. More troublingly, Ms. Alexander believed the defendant then should have the obligation to show why he should not be executed:

Q: But, what I'm trying to get at is if you're in a vacuum and all you know is someone has killed multiple times and without justification and premeditated murders, there's been no self-defense or anything like that, do you start off believing the person should receive the death penalty? There's no right or wrong answer.
A: I would have to say yes then.
Q: Is that a strong presumption on your part?
A: Fairly strong, yes.
Q: Would you expect then that the defendant would have to show you a reason that he shouldn't receive the death penalty?
A Yes.
. . .
Q: Mrs. Alexander, that's where you start off believing, that's what you said before, right?
A: Under certain circumstances, yes, but I need more information.
Q: But if someone is convicted of multiple murders and there is no self-defense and there is no other reason, you start off

believing the person should receive a death penalty; is that right? That's what you said before.

A: Yes.

Q: And you would expect a defendant to prove to you why he shouldn't?

A: No.

Q: Isn't that what you said before?

A: No.

Q: You expect us to - - you would start off there presuming he should receive the death penalty?

A: Now the State has to prove, right?

Q: Right. But in your heart you would presume the person should receive the death penalty?

A: I think so.

RP 2112, 2118.

The court denied Mr. Yates's challenge, finding her answers did not necessarily indicate she would not follow the court's instructions. RP 2126.

*iii.* Donald Victorine. Mr. Victorine, Juror 100, during the hardship questioning, noted that his nephew was getting married and he had a family reunion scheduled in Iowa in August 2002. RP 1722. Despite the apparent importance of these family events, Mr. Victorine stated that he would rearrange and reschedule his plans because, "I'd like to serve on this panel, . . ." RP 1722.

During *voir dire* questioning, Mr. Victorine gave further insight into his strong desire to sit on the panel admitting that Mr. Yates must

have done something because he is sitting in court as a defendant. RP 2572-73.

> Q: So as you start out from the get-go you're thinking [Mr. Yates] must have done something or he wouldn't be sitting her, is that fair enough?
> A: Uh-huh.

*Id.*

Nonetheless, the court denied Mr. Yates's challenge. RP 2582.

*iv.* Michael Hoenow. Mr. Hoenow, Juror 120, evidenced a clear preference for the death penalty early in his questioning by the State:

> Q: Since you were hailed in with your fellow prospective jurors on June 20th, have you thought about your views on the death penalty?
> A: No, they haven't changed a bit.
> Q: And why don't you briefly summarize those for us.
> A: I am a firm believer in the death penalty. A person - - he or she should face their actions. They should be liable for them. And if a child is involved, a child's murder, I think it ought to be mandatory for death penalty because what can a little child do to you that should allow someone to kill them?

RP 3444.

After soft pedaling his predisposition for the death penalty, at the conclusion of the defense questioning Mr. Hoenow reiterated that strongly held belief by quite honestly answering:

Q; Do you start off thinking that that person (convicted of premeditated murder with aggravating circumstances of sound mind) should receive the death penalty?
A: Honestly, yes.

RP 3455-56.

Once again, despite Mr. Hoenow's very honest answer evidencing his firmly held belief that he would automatically start out presuming the death penalty was the proper sentence, the court denied the defense challenge for cause, finding that despite Mr. Hoenow's presumption for death he was somehow not predisposed to it. RP 3462.

c. Jurors may only be removed for cause if their opposition to death penalty would prevent or substantially impair their ability to be a juror. The Sixth and Fourteenth Amendments to the United States Constitution, as well as Article. I, §§ 3 and 22 of the Washington Constitution guarantee a defendant the right to a trial by an impartial jury. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *State v. Rupe,* 108 Wn.2d 734, 748, 743 P.2d 210 (1987), *cert. denied,* 486 U.S. 1061 (1988).

A trial court infringes a capital defendant's right to an impartial trial under the Sixth and Fourteenth Amendments when it excuses for cause jurors who express conscientious objections to the death penalty.

*Witherspoon v. Illinois,* 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *State v. Brett,* 126 Wn.2d 136, 157, 892 P.2d 29 (1995). A juror must not be excused for cause unless his or her views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *State v. Hughes,* 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). The fact that a prospective juror "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" is not sufficient. *Witherspoon,* 391 U.S. at 522. "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." *Dutton v. Brown,* 812 F.2d 593, 595 (10th Cir.), *cert. denied, Dutton v. Maynard,* 484 U.S. 836, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987).

Where the trial court excuses a juror who qualifies as impartial under *Witt,* the error is never harmless and the remedy is reversal of the death sentence. *Gray v. Mississippi,* 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (the right to an impartial adjudicator is a right so basic to a fair trial that an error can never be treated as harmless error); *Davis v. Georgia,* 429 U.S. 122, 123, 97 S. Ct. 399, 400, 50 L. Ed. 2d 339 (1976) (*per curiam*).

d. The trial court improperly excluded jurors 39, 52, and 74. The trial court improperly excused Joan Rodrigues, juror 39, Evelyn Brown, Juror 52, and Nancy Dealba, Juror 74, who all expressed conscientious objections to the death penalty but assured the court they would follow the law and the court's instructions.

A juror with preconceived ideas need not be disqualified if he or she can "put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court." *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407, (1986). That is exactly what Ms. Rodrigues promised to do but was nonetheless excused for cause.

The Eleventh Circuit found error in the exclusion of jurors who had more serious reservations about the death penalty than the jurors here. *Hance v. Zant,* 696 F. 2d 940 (11th Cir. 1983). In that case, the federal district court held the trial court improperly excluded two jurors Mrs. Melton and Ms. Turpin. The district court held that Mrs. Melton's answers vacillated. In response to some questions she appeared firm about refusing to vote for the death penalty but her responses to other questions indicated a lack of conviction:

> PROSECUTOR: No matter what the facts or circumstances of this case might be, you do not believe that you could follow the instructions of the Court to consider the death penalty and vote to impose it, is that right?

MRS. MELTON: No, sir, as I said before, I feel there are times when the death penalty is warranted. I do not believe that I with my conscience could vote to impose the death penalty.

PROSECUTOR: No matter what the facts or circumstances of the case might be?

MRS. MELTON: In some cases I might.

Before excusing her for cause, the judge asked a final question:

THE COURT: Let me just ask her my question too, then, are you so conscientiously opposed to capital punishment that you would not vote for the death penalty under any circumstances?

MRS. MELTON: As I said before, I believe there are circumstances where the death penalty is warranted. I do not believe that I could vote for it.

*Hance*, 696 F. 2d at 955.

The Eleventh Circuit found that juror Turpin was even less resolute in her feelings about the death penalty. Although her initial responses to the prosecutor's questions indicated that she would not vote for a sentence of death, upon further examination she changed her mind.

COUNSEL: If you thought from the facts you heard in the whole case that that was the proper decision to make, that he should be electrocuted, could you vote that that was what you thought should be done?

MS. TURPIN: Well, this is hard, I don't know. I'm just too confused. I don't know.

THE COURT: Well, what we want to find out is if he should be found guilty, after you've heard all the circumstances about this case, do you think that there is any way that you could vote to have him executed, that is, to find for the death penalty?

MS. TURPIN: Well, I guess I could.

THE COURT: Well, that's what we need to find out whether or not you could vote for death if the circumstances of the trial, after you've learned all about it, whether or not you could, not that you would, whether you could vote to impose the death penalty?

MS. TURPIN: Well, I don't know. I just say that I don't think I could.

THE COURT: You don't think you could? I believe the juror should be excused for cause. . . .

*Hance*, 696 F.2d at 955.

The circuit court held that by excluding jurors Turpin and Melton, who expressed serious reservations about the death penalty, the jury did not fairly represent a cross-section of the community. It was a jury "uncommonly willing to condemn a man to die." *Id.* at 955-56 (citing *Witherspoon*, *supra,* 391 U.S. at 521).

Similarly, by excusing the three jurors in this case, the trial judge impaneled a jury that lacked the impartiality required by the Sixth and Fourteenth Amendments.

Compare the answers to the *voir dire* questions by these three jurors with the answers provided by jurors who expressed similar

reservations about capital punishment but were not excused despite a State's challenge for cause. Juror 18, Sharilee Kiffee, is a teacher in a women's ministry who regularly attended church and stated her life in the church was very important. RP 2418-24. Although Ms. Kiffee testified her moral beliefs did not tell her the death penalty was wrong, she did admit she did not know if she could vote for the death penalty, she stated she thought she could follow the court's instructions, but also admitted it would be hard to do so. RP 2424-30. The State challenged Ms. Kiffee for cause, arguing she was conflicted in her view of the death penalty and as a consequence she should be disqualified. RP 2434. The defense countered that Ms. Kiffee was honest in testifying that it would be difficult but that she would listen to the evidence and court's instructions and decide the case accordingly. RP 2437. The trial court denied the State's challenge for cause. RP 2438.

Similarly, Juror 97, Morton Martensen, testified he did not think he could vote for the death penalty and admitted he did not think the State should seek the death penalty as punishment. RP 2910-16. He further stated he thought killing of any kind was senseless. RP 2916. He did agree the death penalty was a "pretty important decision" and thought he could vote for death if it came down to it. RP 2915, 2924. He said he would listen to the evidence, listen and respect the views of the other

jurors, follow the court's instructions, and vote for death. RP 2424-28. Again the State challenged the juror and again the court denied the challenge, finding Mr. Mortensen was conflicted, but nevertheless able to impose a death sentence if the State met its burden of proof. RP 2929-34.

These two jurors' beliefs and reservations about the death penalty mirrored that of the excused jurors. In addition, these two jurors agreed to listen to the evidence, stated they would follow the court's instructions and impose a sentence of death although they admitted it would be difficult, provided the State had met its burden of proof - statements mirrored by the three jurors who were excused.

Further exposing the arbitrariness of the court's ruling, juror 177, Roy Conner admitted he believed those that commit multiple murders should face death and it would take quite a bit of evidence to change his mind, but because he uttered the phrase "I would follow the court's instructions," the court refused to excuse him for cause. RP 3895-3903.

The three jurors who were excused for cause were not substantially impaired in their ability to perform the duties of a juror in this case. Each candidly admitted her reservations about imposing the death penalty, but each expressed her ability to set aside their personal feelings, listen to the evidence, and follow the court's instructions. The ability to follow the court's instructions has repeatedly been found by this Court to constitute a

basis for denying a challenge of a juror for cause. *See Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 311, 868 P.2d 835 (1994) ("Each of these jurors evidenced an openness to consideration of all the facts, a fundamental acceptance of their duty to make an independent and thorough evaluation of the facts, and a willingness to follow their instructions and oath."). The erroneous dismissal of these jurors requires reversal of Mr. Yates's death sentence as he was denied his constitutional right to an impartial jury. *Gray,* 481 U.S. at 667-68 ("relevant inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error").

e. The trial court erred in refusing to exclude for cause jurors 9, 29, 100, and 120 whose views on the death penalty substantially impaired their ability to perform their duties as jurors. The defendant has the right to a "life qualified" jury capable of imposing a life sentence just as the State has the right to a "death qualified" jury capable of imposing a death sentence. *Morgan v. Illinois,* 504 U.S. 719, 733-34, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). As such, the defense in a capital case has the right under the Sixth and Fourteenth Amendments to question prospective jurors about their views on the death penalty and to remove for cause jurors who appear inclined to impose a death sentence without considering mitigating evidence. *Id.*

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. . . If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.

*Id.* at 729.

Again, a comparison of the beliefs and answers to the *voir dire* of these three jurors, whom the court refused to excuse, with the jurors who were excused emphasizes the error in the court's ruling.[7]

Dana Schenefeld, Juror 106, testified he had heard about the prior case of Mr. Yates's in Spokane and believed he was guilty in Spokane and, based upon that belief, presumed Mr. Yates was guilty here. RP 3342-45. While agreeing he could follow the court's instructions, he also admitted he believed that anyone found guilty beyond a reasonable doubt of aggravated murder should receive the death penalty. RP 3352. The court rejected the State's arguments against the defense challenge for

[7] The court granted two defense challenges for cause, juror 67 Josepha Ngiraingas and juror 105 Anthony Tanabe, not based upon their views on capital punishment but because of their failure to grasp the legal concepts of proof beyond a reasonable doubt. RP 2656-58, 3340. The court also excused juror 154, Mary Riley, not because of her views on the death penalty but because she had heard of facts from Mr. Yates's Spokane case and based upon that information believed Ms. Yates was guilty of these two murders. RP 3800-06.

cause, finding Mr. Schenefeld's presumption of guilt troubling. RP 3364-65.

Juror 135, Adrian Chavez, stated he was raised a Christian and admitted that if he found Mr. Yates guilty he would automatically vote for death. RP 3362-65. The court granted the defense challenge. RP 3568.

Similarly, juror 152, Lawrence Bowlin, admitted that his opinion was that Mr. Yates was guilty, felt that if he was found guilty of premeditated murder he should be sentenced to death and that any factors in mitigation would not matter. RP 3775-77. The court excused this juror for cause. RP 3777.

The responses of jurors 9, 29, 100, and 120 were no less problematic. Each admitted either a presumption of guilt or presumption that death was the proper penalty, and yet the court denied Mr. Yates's challenges. Such a presumption disqualified each from serving on the jury, and the court erred in refusing Mr. Yates's challenges. *Morgan*, 504 U.S. at 733-34.

5. THE COURT VIOLATED MR. YATES'S RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY WHEN IT RESTRICTED *VOIR DIRE* REGARDING THE VENIRE'S RELIGIOUS AFFILIATION AS IT RELATED TO MERCY

a. Defense proposed questions regarding religious affiliation. The defense proposed questioning the jurors regarding their individual religious beliefs. CP 2827-32. The defense related that these questions were relevant to the potential jurors' definition of mercy, which is a non-statutory mitigating factor the jury is instructed it may use in ultimately determining the sentence. RP 1186-88. This information would have been helpful to the defense in exercising their for-cause challenges as well as their peremptory challenges. *Id.* Specifically, the defense sought to ask four questions:

1. What is your religious affiliation, if any?
2. What is the fundamental teaching of your religion?
3. What influence has religion had on your life?
4. Describe your religious beliefs or philosophy?

RP 2827.

The trial court refused to allow the questions and limited any questioning regarding religion to the jurors' ability to be fair and impartial. RP 1200-02. The court ruled it would never allow questions regarding the jurors' religious affiliation because religion is a protected area and the question would infringe on the jurors' privacy. RP 1200-01.

b. The trial court's restricting the *voir dire* questioning of the *venire* violates a defendant's right to due process. *Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia,* 500 U.S. 415, 431, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493, 509 (1991). A capital defendant's right to *voir dire*, while grounded in statutory law, also is rooted in the Due Process Clause of the Fourteenth Amendment. *Morgan,* 504 U.S. at 729. Generally, a trial court may properly limit inquiry into a venire member's religious beliefs in those instances where religious issues are expressly presented in the case, where a religious organization is a party to the litigation or where the inquiry is a necessary predicate to the exercise of peremptory challenges. *See generally Yarborough v. United States,* 230 F.2d 56, 63 (4th Cir.1956), *cert. denied,* 351 U.S. 969, 76 S.Ct. 1034, 100 L.Ed. 1487 (1956); *Brandborg v. Lucas,* 891 F.Supp. 352 (E.D.Tex.1995); *State v. Via,* 146 Ariz. 108, 704 P.2d 238, 248 (1985), *cert. denied,* 476 475 U.S. 1048, 106 S.Ct. 1268, 89 L.Ed.2d 577 (1986); *Coleman v. United States,* 379 A.2d 951, 954 (D.C.Ct.App.1977); *Rose v. Sheedy,* 345 Mo. 610, 134 S.W.2d 18, 19 (1939); *Smith v. State,* 797 So.2d 503 (Ala.Crim.App.2000).

c. The religious beliefs of potential jurors and how those beliefs related to mercy was a necessary predicate for the proper exercise of Mr. Yates' peremptory challenges. WPIC 31.07 states in relevant part:

> A mitigating circumstance is a fact either in the offense or about the defendant which in fairness *or in mercy* may be considered as extenuating or reducing moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.
>
> *The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proven beyond a reasonable doubt that the death penalty is warranted.*

(Emphasis added.). This Court has upheld the instructing of the jury using WPIC 31.07. *See State v. Gentry*, 125 Wn.2d 570, 648, 888 P.2d 1105, *cert. denied* 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) (the finding of mercy is not an emotional consideration but one based upon reason).

Mercy was a mitigating factor which the jury could consider in determining whether or not to impose the death penalty. The defense questions regarding religious affiliation were relevant as they probed into the potential jurors' ability to apply mercy to Mr. Yates. The questions also provided the defense with additional information in assessing how and when to use their peremptory challenges.[8] Further, a person's

[8] The defense recognized under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) it would be barred from using religious affiliation as a basis for exercising peremptory challenges, but the information was nevertheless useful in

definition of mercy is commonly based on religious teachings and beliefs and thus forms the basis for a juror's view of mercy. The court erred in barring the defense from inquiring about the religious affiliation.

d. The court's rationale for denying the defense proposed questions was erroneous.

*i.* Constitutionally protected area. The court denied the defense request partially on the basis that religion is a protected area. RP 1200. This basis flies in the face of the numerous questions in the juror questionnaire that directly delved into protected areas. *See* CP 3280 (Do you identify with any political party?); CP 3284 (Do you belong to or associate with any groups that have crime prevention or law enforcement as a goal?); CP 3295 (Do you belong to an organization involved in crime prevention, offender counseling victim counseling, gun use/ownership or which concerns itself with the courts or criminal justice system?); CP 3296 (Have you ever belonged to a group that advocates changes in the law?); CP 3300 (Do you belong to the National Rifle Association? Do you own a firearm? Why do you own a firearm?); CP 3302 (Do you belong to any groups that have taken a position on the death penalty?).

This series of questions in the confidential questionnaire sought answers which infringed on the jurors' First Amendment right to freedom

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assessing whether the potential juror may vote for life or death following the penalty phase. RP 1195-98.

of association and the Second Amendment right to bear arms. The court's concerns about infringing on the jurors' First Amendment right to freedom of religion was simply unfounded.

*ii.* Jurors' privacy. The court was also concerned about the jurors' privacy. RP 1200. This rationale was unfounded for three reasons.

First, the confidential questionnaire sought answers to questions that were even more invasive of the jurors' right to privacy. *See* CP 3288 (Have you or someone you know ever given money to someone in exchange for sex? Have you ever been acquainted with someone who has accepted money for sex? Have you ever accepted money for sex?); CP 3289 (Have you ever been subject to nonjudicial punishment or an Article 32 of the UCMJ hearing?); CP 3290 (Have you ever taken a human life, whether in the military or otherwise?); CP 3292 (Have you ever been questioned by the police? Have you, a family member or close friend, ever been accused of a crime?); CP 3293 (Have you used an illegal drug within the past 5 years?); CP 3299 (Have you or anyone you know been treated by a psychiatrist or psychologist or any type of mental health professional?).

Second, the court conducted individual *voir dire* with each juror. *See Rupe,* 101 Wn.2d at 694 (approving of procedure adopted by

California Supreme Court in *Hovey v. Superior Court of Alameda County,* 28 Cal.3d 1, 80-81, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980)). Any privacy concerns were unfounded since jurors' answers were not shared with other jurors or the public.

Finally, and most importantly, the State conducted background checks on prospective jurors using the Pierce County Sheriff's Department, virtually eliminating any expectation of privacy the jurors may have held. RP 1382-87, 1799. The State refused to share any of the information obtained, and claimed it had free reign to roam through the jurors' backgrounds and need not disclose anything it discovered to the juror, the defense, or the court. RP 1799. Given the State's invasive inquiries, the court's ruling that the jurors' privacy would be infringed merely by allowing the defense to inquire of the jurors' religious beliefs was spurious.

The court erred in preventing Mr. Yates' from inquiring into the juror's religious beliefs. This Court should reverse Mr. Yates's convictions and remand for a new trial.

## 6. THE TRIAL COURT RELIEVED THE STATE OF ITS BURDEN OF PROVING THE ELEMENTS OF THE CRIME OF AGGRAVATED FIRST DEGREE MURDER

The Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, § 3 of the Washington Constitution require the State prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Here, the trial court erroneously defined the common scheme or plan aggravating factor and thereby relieved the State of its burden of proof, depriving Mr. Yates of due process.

a. The aggravating elements set forth in RCW 10.95.020 are elements of the offense of aggravated first degree murder. In *Apprendi v. New Jersey*, the Court explained the rule of *Winship* applies to any finding of fact, whether that finding be termed an element or sentencing factor, which increases the range of punishment to which a person is exposed. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Ring v. Arizona*, the Court concluded the finding necessary to increase a capital defendant's punishment from life in prison

to death fell within the rule of *Apprendi* and was the equivalent of an element of a greater offense. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). While *Ring* used the term "functional equivalent of an element" the Court has made clear *Apprendi* concerned whether "facts labeled sentencing factors were nevertheless 'traditional elements.'" *Harris v. United States*. 536 U.S. 545, 557-58, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003). *Harris*, decided the same day as *Ring*, added

> *Apprendi* and [*McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)] mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

*Harris*, 536 U.S. at 557-58 (emphasis added).

In this respect, decisions of this Court which previously concluded the aggravating factors of RCW 10.95.020 are not elements of a crime conflict with *Apprendi*, *Ring*, and *Harris*. See e.g. *State v. Irizarry*, 111 Wn.2d 591, 763 P.2d 432 (1988). These decisions were premised on the now plainly incorrect notion that "aggravated first degree murder" was not a crime. These cases concluded, instead, the crime was first degree murder, and the aggravating factors merely operated to fix the sentence. In a recent decision, this Court again held "aggravating factors for first degree murder are not elements of that crime but are statutory enhancers

that increase the maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty." *State v. Thomas*, 150 Wn.2d 821, 848, 83 P.3d 970 (2004).

*Thomas* is incorrect in two regards. First, it states the maximum penalty for first degree murder is life with the possibility of parole when in fact the United States Supreme Court has recently made clear the "maximum penalty" for an offense in Washington is the top of the determinate standard range. *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004). Because a sentence of life without the possibility of parole is not available based solely on a guilty verdict for first degree murder, it is not the maximum penalty for the crime for purposes of the Sixth and Fourteenth Amendments. Instead, the maximum penalty for first degree murder is the top of the standard range based upon a particular defendant's offender score.

Second, and more importantly, the distinction drawn by *Thomas* between elements and "statutory enhancers that increase the maximum sentence" is one with no constitutional significance. *Ring* and *Harris* make clear that these are one and the same for purposes of the Sixth and Fourteenth Amendments.

> *Apprendi* and *McMillan* mean that those facts setting the outer limits of a sentence, and of the judicial power to

> impose it, are **the elements** of the crime for purposes of the constitutional analysis.

*Harris*, 536 U.S. at 557-58 (Emphasis added). Because, as *Thomas* recognized, the aggravating factors increase the maximum penalty, those factors are indeed elements of the crime of aggravated first degree murder.

Recently this Court seemingly recognized the error of the distinction it drew in *Thomas*, stating "[u]nder *Ring* and *Apprendi* the *elements* of aggravated first degree murder are premeditated first degree murder under RCW 9A.32.030(1)(a) and at least one of the aggravating circumstances from RCW 10.95.020." (Italics in original) *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415, 419 (2005). *Mills* properly states the elements of the crime of aggravated first degree murder.

As elements of the crime of aggravated first degree murder, the aggravating factors must meet the same constitutional requirements as any other element, including proof beyond a reasonable; not because it is statutorily required but because the Sixth and Fourteenth Amendments mandate it.

b. Proof of the common scheme or plan element of aggravated murder requires proof of a nexus between the murders. RCW 10.95.020 provides in relevant part:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as

> defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:
> . . .
> (10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.
> . . . .

To prove multiple killings were committed as part of a common scheme or plan, the State must prove a "nexus between the killings." *State v. Pirtle*, 127 Wn.2d 628, 661-62, 904 P.2d 245 , *cert. denied*, 518 U.S. 1026 (1996)(citing *State v. Dictado*, 102 Wn.2d 493, 501, 687 P.2d 172 (1984); and *State v. Grisby*, 97 Wn.2d 493, 501, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983)). The factor requires proof of "an overarching plan that connects [the] murders." *State v. Finch*, 137 Wn.2d 792, 835, 975 P.2d 967, *cert. denied*, 528 U.S. 922, (1999). Stated differently, the State must prove a "nexus between the killings and not the killers." *State v. Guloy*, 104 Wn.2d 412, 416, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020 (1986) (citing *Grisby*, 97 Wn.2d 493).

The State contended below, and undoubtedly will do so on appeal, that in *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995), this Court modified the proof required under RCW 10.95.020(10), permitting the element to be proved merely by showing a person devised an overarching plan and used it to perpetrate separate but very similar crimes. *See, e.g.*,

CP 2698 (contending *Lough* created second definition for purposes of RCW 10.95.020(10)); CP 4025 ("A common plan is evidenced by separate, but very similar killings"). *Lough*, however, never addressed the definition of the common scheme element of aggravated murder, and it never couched its analysis in terms of evidentiary sufficiency at all.

In its briefing and argument below, the State noted that *Finch* cited *Lough,* in its discussion of the common scheme element. CP 2698; RP 1079. From this citation to *Lough* the State leaped to the conclusion that *Finch* adopted a second definition of common scheme or plan, a definition equal to that established for admission of evidence under ER 404(b). The State argued this definition eliminated the need to establish the murders were connected to one another, and permitted the State to prove only that there were multiple murders committed in a similar way. *See* CP 4025 ("common scheme is evidenced by separate but very similar killings"); CP 1686-89.

The first problem with the State's contention is that *Lough* never once cites RCW 10.95.020(10), and thus it is quite a stretch to claim this Court added a second definition of this element merely by mentioning the standard of when evidence may be admitted under ER 404(b). At the end of the day, *Finch* left no doubt that the quantum of proof necessary to establish the common scheme element of aggravated murder remained

proof of a nexus between the multiple murders. *Finch* said a common scheme or plan:

> . . . may refer to the situation where "several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan." *Pirtle,* 127 Wn.2d at 662 . . . (quoting *Lough,* 125 Wn.2d at 855). The term refers to a larger criminal design, of which the charged crime is only part. *Pirtle,* 127 Wn.2d at 662; *State v. Bowen,* 48 Wn.App. 187, 192, 738 P.2d 316 (1987). To prove the existence of this aggravator the killings must be connected by a larger criminal plan. *Pirtle,* 127 Wn.2d at 662. Thus, the "nexus" exists when an overarching criminal plan connects both murders. *See Pirtle,* 127 Wn.2d at 662, 904 P.2d 245; *see also Dictado,* 102 Wn.2d at 277 (killings were in furtherance of a gambling scheme); *Grisby,* 97 Wn.2d at 496 (multiple killings in revenge for being sold bad quality drugs).
>
> In *Pirtle,* the defendant argued that there must be evidence of a plan to commit multiple murders to satisfy this aggravator. This court rejected the argument explaining that it misconstrued common scheme or plan. *Pirtle,* 127 Wn.2d at 663. The court explained the evidence need not show the existence of a plan to kill the named individual or even that the killings be committed for precisely the same reasons, only that the killings are connected by a larger criminal purpose. *Id.*

(Internal citations altered.) *Finch*, 137 Wn.2d at 835. *Finch* plainly did not eliminate the requirement of a connection between the murders.

Undeterred by the actual holding of *Finch*, the State contended below that by its mere citation to *Lough*, *Finch* implicitly altered the definition of the common scheme element, thereby eliminating the requirement that the murders be connected. CP 1686-88. Under the

State's myopic reading of *Finch*, the common scheme element may now be established merely by proving a single individual committed multiple murders in a similar fashion regardless of whether those murders are connected by any fact other than the defendant himself. Neither *Finch* nor *Pirtle* ever said as much. More importantly, *Finch* expressly ended its discussion by reaffirming the requirement that proof of the common scheme element requires the state prove a nexus between the murders which are alleged to be a part of the common scheme or plan. 137 Wn.2d at 994.

*Lough* identified two situations in which evidence may be admitted as evidence of a common scheme or plan under ER 404(b). The first involves a scenario in which "several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan." *Lough*, 125 Wn.2d at 855. The second scenario arises where there is "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id.* at 856. *Finch* and *Pirtle* cite only to the first of these two definitions. *See Finch*, 137 Wn.2d at 835-36; *Pirtle*, 127 Wn.2d at 264. *Pirtle* explained this first definition is precisely the scenario presented in *Dictado* and *Grisby*. *Pirtle*, 127 Wn.2d at 662 (citing *Dictado*, 102 Wn.2d at 281; and *Grisby*, 97 Wn.2d at 469). Thus, that

portion of *Lough* relied upon by *Pirtle* and *Finch* is wholly consistent with this Court's prior cases defining the common scheme element of RCW 10.95.020(10).

However, the State consistently argued that *Lough* allowed the common scheme element of RCW 10.95.020(10) to be established merely on proof of sufficient similarities between the murders, the second scenario discussed in *Lough*. CP 1686-87. There is not a single case in this state which has engrafted this second scenario into RCW 10.95.020. *Lough* certainly does not do so. In light of the fact that both *Finch* and *Pirtle*, even after discussing *Lough*, plainly require proof of a connection between the killings, there is absolutely no support for the State's position.

Ignoring this, the State contended below that the fact that *Lough* was only concerned with ER 404(b) was irrelevant to the State's argument that the common scheme or plan element no longer required proof of a nexus. But this is a critical distinction. *Lough* did not undertake to define the term "common scheme or plan" in every circumstance in which that phrase might arise in every area of the law. Rather, it was solely concerned with the question of when does a trial court abuse its discretion in admitting evidence. Thus, the standard announced in *Lough* merely identifies the parameters of a court's discretion to admit evidence as proof of a common scheme, and not the standard for when the evidence will

establish beyond a reasonable doubt that such a plan exists for purposes of RCW 10.95.020(10).

Additionally, when admitted pursuant to ER 404(b) to prove a common scheme, such a plan, if proved, must still be relevant to prove and element of the offense. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Saltarelli,* 98 Wn.2d 358, 362, 655 P.2d 697 (1982). If the standard for admitting the evidence under ER 404(b) also becomes the standard for determining the sufficiency of proof under RCW 10.95.020(10), the alleged plan need no longer be relevant to prove some other material fact, as the plan itself is the material fact sought to be proved. The decision to admit the evidence need only be based on a preponderance of the evidence. Yet once admitted on this lower threshold the evidence will establish the element of aggravated murder beyond a reasonable doubt with no additional proof. Thus, engrafting the standard for admission of evidence into the standard for the sufficiency of proof of an element of a crime, necessarily lowers, if not eliminates, the State's burden of proof on the element.

This is a result which the Legislature has expressly barred in enacting RCW 10.95.010 which provides "No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the

provisions of this chapter." Altering the standard for sufficiency of the proof of the element in RCW 10.95.020(1) by engrafting onto it the standard for admission of evidence under ER 404(b) not only lowers the standard of proof but also violates the provisions of RCW 10.95.010.

The State's next contention was that holding fast to this Court's decisions requiring the State prove a nexus would serve to render ER 404(b) meaningless. CP 4068-70. To the contrary, this Court's cases and ER 404(b) have coexisted for years. The State's argument again fails to comprehend the significant difference between what the State must proffer to convince a court to exercise its discretion to admit evidence and what the State must prove to obtain a conviction of aggravated first degree murder. The State remained free to use evidence of the Spokane murders as proof of a common scheme under ER 404(b). And this evidence may serve as proof of the common scheme element. But it is something altogether different to say that because evidence was admitted to establish a common scheme for purposes of ER 404(b) it necessarily established the common scheme element of RCW 10.95.020(10). The rule and the element each stand alone.

This Court has never wavered from the standard of *Grisby* and *Dictado* that proof of the common scheme element requires proof that the killings are connected.

c. Instruction 20 misstated the common scheme or plan element and substantially lowered the State's burden of proof. Mr. Yates proposed an instruction which explained:

> In order to prove "common scheme or plan" there must be a nexus between the killings that goes beyond the mere firing of the fatal shots. The term "common scheme or plan" refers to a larger criminal design of which the charged crime is only a part. To prove the existence of this aggravating circumstance the state bears the burden of beyond a reasonable doubt that the killings must be connected by a larger criminal plan.

CP 4035. The court rejected this instruction and instead instructed the jury using the State's proposed instruction that:

> A "common scheme or plan" means there is a connection between the crimes in that one crime is done in preparation for the other.
>
> A "common scheme or plan" also occurs when a person devises an overarching plan and uses it to perpetrate separate but very similar crimes."

CP 4106.

The court was not required to provide an instruction on the definition of the common scheme element. *State v. Jeffries*, 105 Wn.2d 398, 419, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). However, once it did so it was required to define the element in a manner which did not eliminate or reduce the state's burden of proof of the element. *State v. Cronin,* 142 Wn.2d 568, 579-80, 14 P.3d 752 (2000) (citing *Winship,* 397 U.S. at 364; *State v. Jackson,* 137 Wn.2d 712, 727, 976 P.2d 1229 (1999);

*State v. Acosta,* 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); *State v. McCullum,* 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983); *State v. Green,* 94 Wn.2d 216, 224, 616 P.2d 628 (1980)).

The second alternative of the court's instruction eliminated the requirement that the murders each be connected to the common scheme or plan. Thus the jury was free to convict Mr. Yates based only on the common fact that he killed both victims in a similar fashion.

This was precisely the result advocated by the State throughout trial. The State maintained that if it were required to prove a connection between the murders it would raise its burden of proof. RP 7369, 7386. In closing argument the State told the jury not to be misled into believing the common scheme element required proof of anything more than similarities between the murders. CP 7574. In fact, in first requesting the court provide an instruction defining common scheme or plan in the manner urged by the State, the State contended it was necessary "to preclude the Defendant from suggesting to the jury at any point in time that the State is limited to proving a specific plan, and a factual connection between all the murders." CP 1688. It was precisely because it altered the burden of proof that the State desired the instruction in the first place. And this was precisely the effect of the instruction.

The State was correct in its contention that a requirement of a nexus would raise the State's burden beyond merely proving similar murders were committed. But this simply places the burden at the level this Court and the statute have long required. What the State was really arguing, or perhaps more properly conceding, was that they could not prove the common scheme element if held to the standard of *Finch*, *Grisby*, and *Dictado*.

This is of course the conclusion reached by the Spokane, Skagit and Walla Walla prosecutors which led to their decision to enter plea negotiations. CP 631. It was the view shared by other experienced capital prosecutors who advised Mr. Tucker there were substantial difficulties in proving the common scheme element in a case such as this. CP 634. That the desire of the Pierce County Prosecutors Office to "show up" the Spokane County prosecutors clouded their ability to recognize this, should not permit the lowering of the standard of proof to accommodate them.

Instruction 20 misstated the law and lowered the State's burden of proving each element of the crime beyond a reasonable doubt, thus depriving Mr. Yates of due process under the Fourteenth Amendment and Article I, § 3 of the Washington Constitution.

d. Because Instruction 20 relieved the State of its burden of proof on an element of the offense, the state constitution requires reversal. The most fundamental concepts of criminal procedure require the State prove to a jury every essential element of a crime beyond a reasonable doubt. *Cronin*, 143 Wn.2d at 580 (citing *inter alia Winship*, 397 U.S. at 364). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, § 3 of the Washington Constitution and the Fourteenth Amendment of the federal constitution. *Sandstrom*, 442 U.S. at 520; *Acosta*, 101 Wn.2d at 615.

The more specific and detailed guarantees of the right to jury trial and due process of law in the Washington Constitution are the origin of this Court's traditional requirement of automatic reversal where the jury is instructed in a manner which relieves the prosecution of its burden of proving all the elements of the crime. As the federal constitution establishes a minimum level of protection, any time the federal constitution is violated corollary provisions of the state constitution are necessarily violated. Thus, a separate analysis of the requirements of the state constitutional violation is appropriate.

*i.* Article I, § 21. The Washington Constitution provides "The right to trial by jury shall remain inviolate...." Const. Art. I, § 21 This includes the right to jury trial in criminal cases. *State ex rel.*

*Dep't of Ecology v. Anderson*, 94 Wn.2d 727, 728, 620 P.2d 76 (1980). In construing this provision, this Court has held that it preserves the right as it existed at common law in the territory at the time of its adoption. *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). The Court has further determined that the right to trial by jury which was kept "inviolate" under the state constitution was more extensive than that protected under the federal constitution when it was adopted in 1789. *Id.* at 99.

Having already determined that the right to jury trial guaranteed by the Washington Constitution is broader than that guaranteed by the federal constitution, the full analysis developed in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. *See, e.g. State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). Nevertheless, the *Gunwall* factors provide a useful tool for evaluating the application of the specific state constitutional provisions to the circumstances presented.[9]

This Court recognized almost 100 years ago that unique language providing the "right to trial by jury shall remain inviolate" results in a broader guarantee than that in the federal constitution. *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). The differences are significant

[9] The six factors are (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) mattes of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61-62.

because the state constitution sought to preserve the right to jury trial as it had developed during the time between the adoption of the federal constitution in 1789 and the state constitution one hundred years later. *Strasburg*, 60 Wash. at 118; *Mace*, 98 Wn.2d at 99.

The jury trial guarantees of the state constitution, operating in conjunction with the due process provisions, give the accused the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. *Strasburg*, 60 Wash. at 118 (defendant had right to present insanity defense to the jury which could not be legislatively abolished). The Court's discussion in *Strasburg* of how the entire criminal process is grounded in the right to have all questions of fact going to the guilt or innocence of the accused submitted to the jury has carried from *Strasburg* though decisions to decisions such as *Cronin*.

The absolute nature of these rights was addressed by the Court in the context of the removal of any element from the jury's consideration.

> Now, this right of trial by jury which our constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury; else the legislature could, by a process of elimination in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury.

*Strasburg*, 60 Wash. at 116. The interrelationship between the state due process clause and the right to jury trial guaranteed by the state constitution was specifically worthy of comment.

> The due process of law provision of our constitution above quoted probably does not, of itself, mean right of trial by jury; but it does mean, in connection with the provision "The right of trial by jury shall remain inviolate", that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our constitution.

60 Wash. at 117. The state constitutional jury right which the constitution preserves "inviolate" plainly encompassed the right to have every element submitted to the jury.

With regard to the third and fourth *Gunwall* factors, *Strasburg* makes clear that the state constitutional and common law history of the right to jury trial in Washington extends to every significant fact upon which guilt is determined. *Id.* at 117-18. *Strasburg* noted:

> **The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence.** Otherwise this provision of our constitution, found, also, in varying language in all the constitutions of the Union, state and Federal-treasured by a free people for generations as one of the principal safeguards of their liberties-would be rendered void and utterly fail in the purpose which our people have always believed it was intended to accomplish.

60 Wash. at 118 (emphasis added). Because preexisting state law required these issues be presented to the jury, removing from the consideration of the jury any fact or element necessary to determining guilt, "has the effect of depriving the appellant of liberty without due process of law, especially in that it deprives him of the right of trial by jury; and is therefore unconstitutional." 60 Wash. at 123-24.

More recently this Court held that where a jury instruction relieves the state of a burden of proving one of the elements of RCW 10.95.020 harmless error analysis cannot apply. *Thomas*, 150 Wn.2d at 849.

The structure of the state constitution as a limitation on the otherwise plenary power of the state to do anything not expressly forbidden supports the rigorous enforcement of the jury trial guarantee against encroachment by the legislature or appellate courts on review of trial court proceedings. *Gunwall*, 106 Wn.2d at 66. Furthermore, because the state constitution, unlike the federal constitution, guarantees these fundamental rights rather than restricts them, the structural differences point toward broader independent state constitutional protections. *Id.* at 62.

Finally, the conduct of criminal trials in state courts is a matter of particularly state or local concern which does not warrant adherence to a

national standard. *Gunwall*, 106 Wn.2d at 62; *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

The long and independent history of the state constitutional right to jury trial provided by Article I, § 21, which is broader in scope and application than the federal provision, guarantees the right to a jury determination on every element. This guarantee ultimately supports the rigid requirements this Court has traditionally imposed where the instructions fail to ensure the jury renders a verdict encompassing every substantive fact going to the question of guilt or innocence.

*ii.* Article I, § 22. Article I, § 22 of the Washington Constitution contains a separate provision guaranteeing the right to jury in a criminal trial, and does so in conjunction with the provisions of rights of the accused including the right "to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . ." When read in conjunction with the guarantee that the accused "shall have the right . . . to demand the nature and cause of the accusation against him [and] to have a copy thereof . . . .", this provision of the Washington Constitution creates a very specific right to jury verdict on the elements of the crime charged. *City of Seattle v. Norby*, 88 Wn.App. 545, 561, 945 P.2d 269 (1997) (failure give unanimity

instruction results in a violation of the right to a unanimous jury verdict under Article I, § 22).

Because of the several ways in which the right to a proper determination by the jury on each element arises from the state constitution, the right warrants rigorous enforcement. The integrity of the trial process and the reliability of the result are both cast into doubt when the jury is erroneously instructed in a way which does not hold it to the constitutional burden. For that reason, failure to obtain a jury finding beyond a reasonable doubt on every element of a crime requires reversal of the conviction.

*iii.* Relieving the State of its burden of proving each element of a crime requires reversal. Instructing the jury in a manner which relieves the State of its burden to establish every element of guilt requires automatic reversal because the omission or misstatement is so fundamental that the verdicts upon which they are based are inherently unreliable. *State v. Jackson*, 87 Wn.App. 801, 813, 944 P.2d 403 (1997), *affirmed*, 137 Wn.2d 712, 976 P.2d 1229 (1999) (citing *Sullivan v. Louisiana,* 508 U.S. 275, , 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Harmless error analysis is incompatible with the absence of an actual verdict based on properly defined elements found beyond a reasonable doubt. *Thomas*, 150 Wn.2d at 849. Lacking a proper verdict,

the appellate court would be infringing the right to a jury trial by holding that no reasonable jury would have found otherwise. *Carella v. California*, 491 U.S. 263, 269, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (Scalia, J., concurring); *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 339-40, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring).

*State v. Hughes* reiterated the point that traditional harmless error inquiry could not apply where the element was not properly submitted to the jury in the first place. _ Wn.2d _, 110 P.3d 192, 205 (2005) (citing *Sullivan*, 508 U.S. at 279-80). *Sullivan* concluded that even if a jury is instructed on each of the elements, the failure to inform the jury that it must make its finding beyond a reasonable doubt could never be deemed harmless. 508 U.S. at 279-80. This is so because where there has not been a proper verdict on each element beyond a reasonable doubt

> The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt--not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(Citations omitted, emphasis in original.) *Id.* at 280; *see also*, *Hughes*, 110 P.3d at 205.

Because the error in this case permitted the jury to convict Mr. Yates of aggravated murder in the absence of proof beyond a reasonable doubt of the statutory elements, as in *Sullivan* and *Hughes* "there is no object . . . upon which harmless-error scrutiny can operate." *See Sullivan*, 508 U.S. at 280. At best this Court could ask "what might the jury have done had the State's burden of proof been properly defined?" This is "appellate speculation" and not harmless error analysis. *Id.* As in *Sullivan*, because Instruction 20 relieved the State of its burden of proving the elements of the offense beyond a reasonable doubt the error cannot be deemed harmless.

Because the jury was not properly informed that a nexus must exist between each killing which was a part of the common scheme or plan Mr. Yates's conviction and sentence cannot stand.

*iv.* Federal use of the constitutional harmless error test with respect to erroneous jury instructions is irrelevant to this case. This Court has previously relied upon the analysis adopted by the United States Supreme Court in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), to conclude an erroneous accomplice liability jury instruction could be subject to a harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). However, *Brown* does not dictate the result here.

First, *Brown* did not concern an instruction which misstated the state's burden with respect to an element. *See*, *State v. Teal*, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004) (holding accomplice liability is neither a separate element nor an alternative means of committing a crime.) Subsequent to *Brown*, this Court concluded that an instruction which misdefines an element of RCW 10.095.020 can never be deemed harmless. *Thomas*, 150 Wn.2d at 849. This Court reiterated that point in *Hughes*, 110 Wn.2d at 205.

Second, *Brown* does not mention or address the implications of the Washington jury trial right. The sum of the court's discussion of the issue was:

> The United States Supreme Court has held that an erroneous jury instruction that omits an element of the offense is subject to harmless error analysis:
>
> Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.
>
> [*Neder,* 527 U.S. at 9]. We find no compelling reason why this Court should not follow the United States Supreme Court's holding in *Neder*.

*Brown*, 147 Wn.2d at 340. As such, *Brown* offers little to this analysis.

In any event, the logical flaw in the *Neder* decision was identified by Justice Scalia who began his dissenting opinion in *Neder* by noting that

*Sullivan* reaffirmed the rule that it would be a structural error to "vitiate all the jury's findings" with an inadequate reasonable doubt instruction.

> The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking *all* of them away-since failure to prove one, no less than failure to prove all, utterly prevents conviction.

*Neder*, 119 S.Ct. at 1845 (Scalia, J., dissenting).

In light of *Thomas* and the absence of any state constitutional analysis in *Brown* this Court must reverse Mr. Yates's conviction and sentence.

e. Even if a harmless error analysis could apply, reversal is required in this case. Assuming arguendo that harmless error analysis could apply, the error in this case nonetheless requires this Court reverse both Mr. Yates's conviction and sentence.

To prove a constitutional error is harmless, the State must prove beyond a reasonable doubt the error did not "contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The harmless error standard is not met by speculating that a hypothetical reasonable juror relying on the properly admitted evidence **could** have reached the same verdict, but rather requires the State prove this specific jury **would have** reached the same

verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

> The inquiry . . . is not whether, in a trial without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. This must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.

*Sullivan*, 508 U.S. at 279. Thus, unless the State can prove that the jury's verdict as to the common scheme element is in no way attributable to Instruction 20, the error requires reversal.

The State sought an instruction defining the common scheme element in the manner of Instruction 20 precisely because the State maintained that if it were required to prove a connection between the murders its burden of proof would be higher. RP 7369, 7386. The State contended the instruction was necessary "to preclude the Defendant from suggesting to the jury at any point in time that the State is limited to proving a specific plan, and a factual connection between all the murders." CP 1688.

Once it succeeded in setting a lower threshold of proof, the State urged the jury to use the lower standard to convict Mr. Yates. The deputy prosecutor specifically told the jury not to let the defense confuse it into

believing the common scheme element required proof of anything more than similarities between the murders. CP 7574. The State acknowledged to the jury "there is no contention" that Melinda Mercer and Connie Ellis were killed as part of an overarching plan. RP 7477.

It was precisely because it lowered the burden of proof that the State requested the instruction in the first place. This was exactly the effect the instruction had. Based on its admission at trial the State cannot prove the error was harmless.

*i.* Reversal of the sentence is required. As set forth below, Mr. Yates contends Instruction 20 not only relieved the state of its burden of proving the common scheme or plan element but also affected the verdicts on the remaining two aggravating elements, requiring reversal of the convictions as a whole. Even if the erroneous jury instruction only affected the jury's verdicts on the common scheme element, reversal of the sentences is required.

RCW 10.95.060(4) requires a jury in a special sentencing proceeding to answer the question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" *See* CP 4445 "The jury is not instructed to consider the crime and separately consider the aggravating factors. Rather, the

aggravators describe the circumstances of the 'crime' for which [the defendant] was found guilty." *Brett*, 126 Wn.2d at 170. Thus, by lowering the burden of proof on a single element, Instruction 20 necessarily impacted the first part of this question, as the crime of conviction was predicated on the incorrect standard.

*Sullivan* cautioned a harmless error analysis cannot ask whether the jury could have rendered the same verdict had they been properly instructed, but must instead ask whether the error contributed to the verdict actually obtained. 508 U.S. at 279. Where the State sought an instruction for the express purpose of lowering the standard of proof, and then urged the jury to rely upon that lower standard, the State cannot prove beyond a reasonable doubt the jurors' answers to the question set forth in RCW 10.95.060 were not attributable to the error in Instruction 20. It does not matter that the jury could have reached the same verdict based only on the remaining two aggravating factors. Instead, the State must prove the jury reached present verdict with no attributable taint from Instruction 20. *Sullivan*, 508 U.S. at 279. The State cannot meet this burden and the sentence must be reversed.

*ii.* Reversal of the convictions is also required. In addition to the common scheme aggravating element the jury was instructed to, and did, return verdicts on two other aggravating elements:

(1) that the murders were committed in the course of a robbery and (2) that the murders occurred to conceal the commission of a crime. CP 4164, 4168.

The State offered no direct evidence that Ms. Mercer or Ms. Ellis had been robbed. Instead, witnesses testified that no money was found on either woman's body. The evidence established, however, that Ms Mercer had no money when she was last seen as it was her intent to "turn a trick" to obtain sufficient funds to buy heroin. RP 5326. The evidence also established that Ms. Ellis often had little or no money in her possession. RP 7192-95.

The State did offer other evidence including an "expert," Lynn Everton, who testified, over objection, prostitutes always obtain payment first. RP 4425-26. Ms. Everson also testified the women often kept the money in their shoes. Other witnesses, who had worked as prostitutes, testified it was their practice to collect the money before performing any sex acts. RP 7037.

In its closing argument, the State told the jury the common scheme included a plan to rob the women Mr. Yates killed. RP 7489. The State also told the jury that the attempted murder of Christine Smith was the template for each of the remaining crimes. RP 7459. Ms. Smith testified

Mr. Yates had given her $40 for oral sex and demanded the money from her after he shot her. RP 4500, 4507.

The State's invitation to roll the remaining aggravating elements into the "common scheme" allowed the jury to look past the dearth of evidence of an actual robbery of either Ms. Mercer or Ms. Ellis to convict Mr. Yates of the robbery aggravating element as well based on mere speculation. In light of the paucity of evidence and the invitation it extended to the jury, the State cannot prove beyond a reasonable doubt that the error in Instruction 20 did not impact the jury's verdict on the remaining aggravators as well. Thus, reversal of the conviction of aggravated murder is required.

7. IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF THE THREE AGGRAVATING ELEMENTS, MR. YATES'S CONVICTIONS DEPRIVED HIM OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT

a. Due process requires proof beyond a reasonable doubt of every element of the crime. In a criminal prosecution, the Due Process Clause of Fourteenth Amendment requires the State prove each element of the crime charged beyond a reasonable doubt. *Winship*, 397 U.S. at 364; *Green*, 94 Wn.2d at 220-21. Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221.

The aggravating elements of aggravated first degree murder are elements of the offense. *Ring*, 536 U.S. at 609, *Mills,* 109 P.3d at 419.

b. The State failed to offer sufficient proof of the three aggravating factors in this case.

*i.* The State did not establish the murders of Connie Ellis and Melinda Mercer were a part of a common scheme or plan. A person commits aggravated first degree murder where he commits premeditated murder, there is more than one victim and the killings are a part of a common scheme or plan. RCW 10.95.020(10). Two or more murders may be a part of a common scheme or plan if there is a nexus between them other than the killer. *Pirtle*, 127 Wn.2d at 661-62; *Finch*, 137 Wn.2d 792;.*Guloy*, 104 Wn.2d at 416.

While the State's evidence did establish Mr. Yates killed "more than one" person, Ms. Ellis and Ms. Mercer, the State offered no evidence to establish a nexus between these two killings other than Mr. Yates. The State argued it need not even prove both murders were a part of the **same** common scheme or plan. RP 7262, 7322, 7325-26. The State conceded to

the jury it was not contending that the murders of Ms. Ellis and Ms. Mercer were part of a single overarching plan. RP 7486.

Unless the State established there was more than one common scheme or plan, and that the murder of Ms. Ellis fell within one and the murder of Ms. Mercer fell within another, the State was required to prove there was a nexus between the two killings. In addition, the State was required to prove a nexus between these two murders and every other murder which the State alleges were a part of the same common scheme.

In cases in which this Court has addressed this aggravating element, the "killings" which were alleged to be a part of a common scheme were the current killings for which the defendants were tried and convicted. For example, in *Grisby*, the codefendants were convicted of five counts of aggravated murder which collectively arose from a common scheme of retaliating against a drug dealer for supplying the defendants with "bad drugs." 97 Wn.2d at 496. In *Guloy*, the defendants were each convicted of two counts of aggravated murder for killing two union officials as part of a common scheme to dampen reform efforts within the union and to further the gambling interests of the gang of which the defendants were members. 104 Wn.2d at 416-17. In *Pirtle*, the defendant was convicted of two counts of aggravated murder for killing two employees of a Burger King restaurant, the defendant's former employer,

in retaliation for the defendant's firing, which plan also included an intent to rob the restaurant. 127 Wn.2d at 663. In *Finch*, the defendant was convicted of two counts of aggravated murder for killing a tenant living at the home of his ex-wife and a sheriff's deputy who was responding to a 911 call. 137 Wn.2d 792. The Court found sufficient evidence of a common scheme existed as a reasonable jury could find based on the defendant's own statements that the defendant intended to kill police officers responding to the initial shooting. *Id.* at 836-37. Mr. Yates has been unable to locate any decision of this Court in which the State was deemed to have presented sufficient evidence to establish the common scheme or plan element where the State relied on one current murder and one or more murder for which the defendant had already been convicted.

By contrast, here the State's theory was not that the murders of Connie Ellis and Melinda Mercer were connected to one another by a common scheme or plan, but that each of them separately was a part of a common scheme with one or more of the murders for which Mr. Yates had previously been convicted of committing in Spokane. The State vociferously argued against instructing the jury that the murders need be connected, arguing that doing so would require the jury to ignore the Spokane murders. RP 7322, 7325. The State conceded the jury might have a reasonable doubt as to whether Connie Ellis's murder was a part of

the same common scheme as Melinda Mercer's death and thus would be required to answer no to that aggravating factor with respect to Melinda Mercer as well. The State argued that requiring that the murders of both Connie Ellis and Melinda Mercer to be a part of the same common scheme would raise the State's burden of proof beyond that which was required. RP 7369, 7386. Finally, the State told the jury "there is no contention" that Melinda Mercer and Connie Ellis were killed as part of an overarching plan. RP 7477.

Ignoring the State's concession of its lack of proof connecting the two present charges, the evidence in fact does not establish the required nexus between the two.

Melinda Mercer was last seen in North Seattle on December 6, 1997, when she told a friend she was going to engage in an act of prostitution to earn enough money to buy heroin. RP 5326-29. Her remains were discovered the following morning in a vacant field in Pierce County. RP 5308. Plastic bags were found over her head. DNA testing established Mr. Yates was the source of semen discovered in her vagina. RP 6754. Ms. Mercer was shot with the same type of bullet and by the same gun as six of the women killed in Spokane. RP 6410-12. Ms. Mercer was Caucasian and had been raised in Centralia.

Connie Ellis's remains were discovered in Pierce County on October 13, 1998. RP 5737-43. By the time of discovery very little soft tissue remained. RP 5905. No DNA results were offered. Ms. Ellis was shot with a similar type of bullet but fired from different gun, a gun used to shoot two of the victims in Spokane. RP 6426-27. A blood stain found in Mr. Yates's van matched Ms. Ellis's blood. RP 6766-68. Plastic bags were found over her head. RP 5908. Ms. Ellis last appeared at a methadone clinic for her prescribed dose on September 17, 1998. RP 6020. Ellis was Native American from South Dakota. RP 6029.

In its best light the evidence established Melinda Mercer and Connie Ellis were killed by Mr. Yates. However, this is not sufficient to establish the nexus required to prove the common scheme or plan aggravator as this Court said the State must prove a "nexus between the killings and not the killers." *Guloy*, 104 Wn.2d at 416. The State did not meet its burden of proof with respect to the common scheme element.

*ii.* The State did not establish the murders of Connie Ellis and Melinda Mercer were committed in furtherance of a robbery. RCW 10.95.020 provides in relevant part:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

. . .

(11) The murder was committed in the course of, in furtherance of, or in the immediate flight there from one of the following crimes:

(a) Robbery in the first or second degree

. . . .

Proof of this element requires proof of an intimate connection between the murder and felony. *State v. Brown*, 132 Wn.2d 529, 607-08, 940 P.2d 546 (1997) (citing *State v. Golloday*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976)). "A 'causal connection' must be clearly established between the two. In other words, 'more than a mere coincidence of time and place is necessary." (Citations omitted.) *Brown*, 132 Wn.2d at 608.

The effort in *Brown* to define the requirements of this element was based entirely on cases addressing noncapital felony murder charges. *See Brown*, 132 Wn.2d at 608-09 (discussing, *Golloday*, 78 Wn.2d at 121 (felony murder predicated on robbery); *State v. Leach*, 114 Wn.2d 700, 790 P.2d 160 (1990) (felony murder predicated on arson), *State v. Dudrey*, 30 Wn.App. 447, 635 P.2d 750 (1981), *review denied*, 96 Wn.2d 1026 (1982) (felony murder predicated on burglary)). In the context of a noncapital felony murder charge this Court long ago held

> It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, **intending to commit some crime other than the homicide**, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the res gestae of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act.

(Emphasis added.) *State v. Diebold*, 152 Wash. 68, 72, 277 P. 394 (1929).

Thus, to prove this element of the offense, the State was required to prove that Mr. Yates intentionally killed Ms. Ellis and Ms. Mercer with the intent and for the purpose of robbing them. It is not enough that the State prove that Mr. Yates intentionally killed the victims and also committed a robbery, as "more than a mere coincidence of time and place is necessary." *Brown*, 132 Wn.2d at 608. The intent to take the property must have been the reason for committing the murders. *See Diebold*, 152 Wash. at 72. Thus, the State does not meet its burden merely by showing that Mr. Yates took property from Ms. Ellis and Ms. Mercer after he intentionally killed them. Yet this is the sum of the State's evidence on this point.

The State's theory was that all prostitutes get paid up front; that no money was found on either Ms. Ellis or Ms. Mercer; thus Mr. Yates must have killed them with the intent to rob them. Otherwise, the State only established a murder followed by a theft. Theft, however, is not among those crimes listed in RCW 10.95.020, and thus could not support the aggravating element. At best, the State's evidence established a robbery which was incidental to the murders, but it fell far short of establishing that the murders were committed for the purpose of robbing the victims. Indeed, the State's principal argument to the jury was that the driving purpose of the killings was Mr. Yates's desire to engage in sexual activity with the bodies. If this is so, again at best the State has proven an incidental taking of property, not that the murders were committed for the purpose of committing a robbery.

The evidence established Ms. Mercer did not have any money when she was last seen, and that it was unlikely that Ms. Ellis did either. The State never established that either woman received anything of value from Mr. Yates before they were killed. The State merely proved that no money was recovered with either woman's remains.

"The existence of a fact cannot rest in guess, speculation, or conjecture." *Golloday*, 78 Wn.2d at 129-30 (quoting *Home Ins. Co. of New York v. Northern Pac. Ry.*, 18 Wn.2d 798, 140 P.2d 507 (1943)). The

State's robbery theory rests entirely on speculation and conjecture, rather than proof beyond a reasonable doubt.

*iii.* The State did not establish the murders of Connie Ellis and Melinda Mercer were committed to conceal the commission of the misdemeanor of patronizing a prostitute. RCW 10.95.020 provides in relevant part:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:
> . . .
> (9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030 . . . .

Proof of this element requires proof that the specific intent of a murder was to conceal the commission of a crime. *Pirtle*, 127 Wn.2d at 628; *Jeffries*, 105 Wn.2d at 420.

In its best light the State's evidence was that both Ms. Ellis and Ms. Mercer worked as prostitutes prior to their deaths. The State argued that Mr. Yates's actions were spurred by his concern that if it was discovered he visited prostitutes, that information would be detrimental to his future rating or promotion in the military. The State's theory suffers one enormous logical flaw: it hinges on the notion that while Mr. Yates

was concerned for the consequences on his career of the misdemeanor offense of patronizing a prostitute, he did not fear similar consequences from commission of the most serious offense of aggravated murder; in short that prostitution offenses would be frowned upon by the military but not murder. Moreover, in light of the testimony of several current and former prostitutes patronized by Mr. Yates but not killed, the State's theory falls apart, as it now must be that Mr. Yates was only interested in concealing his misdemeanor crimes in some instances but not in others.

It is not enough that the State establish the concealment of his patronizing offenses was a result of the murders but rather the State was required to prove that was the purpose for the murders. As this Court cautioned in *Golloday* "the existence of a fact cannot rest in guess, speculation, or conjecture." 78 Wn.2d at 129-30. The evidence offered by the State invited if not required the jury to speculate that if as a result of the murders Mr. Yates succeeded in concealing the crime of patronizing a prostitute that must have been the purpose of the murders. This is insufficient to establish Mr. Yates's specific intent in killing Ms. Mercer and Ms. Ellis was to conceal his crime of patronizing a prostitute.

Moreover, the conclusion that Mr. Yates specifically murdered the women to conceal his misdemeanor offense is inconsistent with the conclusion that rather than an end in and of themselves, the murders were

a means to end, i.e., committed as part of a common scheme to engage in sexual activity with the bodies after death. In its best light, the State's evidence established that by killing Ms. Mercer and Ms. Ellis Mr. Yates's misdemeanor offense was not immediately revealed. But this is something altogether different from proving this was the result he specifically intended.

There was insufficient evidence to prove the aggravating element that Mr. Yates committed the murders of Ms. Ellis and Ms. Mercer with the specific intent to conceal his commission of the crime of patronizing a prostitute.

c. The Court must reverse Mr. Yates's convictions and sentences. The State did not present sufficient evidence from which a rational trier of fact could find Mr. Yates committed the murders of Ms. Ellis and Ms. Mercer (1) as part of a common scheme or plan; (2) in furtherance of the crime of robbery; or (3) to conceal the commission of the misdemeanor of patronizing a prostitute. Where a conviction is reversed for insufficient evidence, the double jeopardy clause requires reversal of the conviction and dismissal of the charges. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *Burks v. United States*, 437 U.S. 1, 18, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978). Thus, this Court must reverse and dismiss Mr. Yates's convictions.